

Missouri Attorney General's Opinions - 1971

Opinion	Date	Topic	Summary
3-71	Apr 26	SCHOOLS. SCHOOL BUSES.	1. A six-director school district may enter into an agreement whereby a school bus is acquired by monthly payments so long as the district's obligation thereunder does not exceed income available for the calendar year in which the debt is contracted. 2. The obligation of a school district to return the school bus under the circumstances set forth in the agreement in question would be a "lien" or "encumbrance" under Sections 301.190, 301.600 and 301.620, RSMo 1969, and should be noted on the certificate of ownership. 3. A six-director school district may agree to pay, in addition to monthly payments, insurance premiums for property damage and liability insurance covering the buses except that the district may not use public funds to purchase liability insurance covering its own negligence.
4A-71	Feb 22		Opinion letter to the Honorable Joe D. Holt
5-71	Jan 12	TAXATION.	A person who holds an unassigned certificate of purchase from a tax sale made in 1963 does not have a lien on the real estate described in the certificate, if such real estate is again sold for delinquent taxes in 1970 or subsequent years.
6-71	May 10		Opinion letter to the Honorable Corley Thompson, Jr.
7-71	Jan 27		Opinion letter to the Honorable J. H. Frappier
9-71	Mar 16		Opinion letter to Mr. William F. Moore
10-71	May 12		Opinion letter to Mr. Joseph Jaeger, Jr. and the Honorable Hardin C. Cox
11-71	Apr 6	OFFICERS. INSURANCE. COUNTY OFFICERS.	County court may pay premiums on group insurance policy covering county officers and employees whose salaries are set by county court or other county officers or circuit judge.
13-71	May 24	DRAINAGE DISTRICTS. CITIES, TOWNS & VILLAGES.	1. That a city in a drainage district organized under Chapter 242, RSMo, is not exempt from the maintenance tax levied by the board of supervisors of the district. 2. That a board of supervisors of such drainage district may charge for the privilege of allowing the overflow from a city's sewage lagoon to spill into the drainage ditch if the drainage from the sewage lagoon did not exist when the drainage district was organized.
15-71	May 10	INSURANCE. COUNTY HOSPITALS.	(1) The board of trustees of a county hospital may not purchase liability insurance to cover their own negligence, as they are protected

			by sovereign immunity. (2) The county hospital board of trustees may authorize the purchase of liability insurance covering the negligence of the employees of a county hospital as a form of compensation. (3) The board of trustees of a county hospital does not waive its sovereign immunity by the purchase of a liability insurance policy covering its employees.
16-71			Opinion letter to the Honorable Peter H. Rea
18-71	Jan 13	CRIMINAL LAW. CONSTITUTIONAL LAW. TAXATION (INCOME).	A taxpayer who refuses to pay Missouri state income tax can be prosecuted for a misdemeanor pursuant to Section 143.330(4), RSMo 1969.
19-71	Feb 22	PROBATION AND PAROLE.	Under Section 549.071, RSMo 1969, the duration of an extension of the term of probation is not limited by the original probation period so long as the total term is within the period of five years for felony cases and two years for misdemeanor cases.
20-71	Jan 22	ELECTIONS. COMMITTEEMEN.	Section 111.171, RSMo 1969, prohibits the secretary or treasurer of a county committee, whether a member of the committee or not, from serving as an election judge or clerk in elections in which the county is involved.
21-71			Withdrawn
22-71	Apr 26		Opinion letter to Mr. Edwin M. Bode
23-71	May 5	INSURANCE.	Subsection 3 of the Division of Insurance's Regulation 3.11, which defines "replacement of life insurance" is in compliance with Section 374.045(1), (3), RSMo 1969, because such regulation is reasonably related to Section 375.936(5), RSMo 1969.
24-71			Withdrawn
26-71			Withdrawn
27-71			Withdrawn
28-71	Oct 14		Opinion letter to the Honorable James L. Paul
29-71	Feb 5		Opinion letter to the Honorable Richard M. Webster
30-71	Oct 6		Opinion letter to Mr. Joseph Jaeger, Jr.
31-71	May 5	TAXATION (SALES AND USE).	The sale by Old Warson Country Club of tickets for admission to the Ryder Cup Golf Tournament is an isolated or occasional sale not subject to Missouri Sales Tax because the tournament is the first ever held by the club to which admission is charged and no future tournaments of this kind are planned or expected to be held.
32-71			

32-71	Aug 18	SCHOOLS. TAXATION (EXEMPTION).	Tangible personal property leased to a school district at a profit is not exempt from taxation under Article X, Section 6, Missouri Constitution, or under Section 137.100, RSMo 1969. Furthermore, a school district may agree, as part of the total yearly lease payment, to pay the amount of any taxes levied on the tangible personal property leased to the school district.
34-71	May 12		Opinion letter to Mr. Harvey D. Shell, P.E.
35-71	Oct 19	SOCIAL SECURITY. COUNTY COLLECTOR.	1. The county is liable to make restitution to the collector of revenue for personal funds of the collector used to pay the county's obligation under the Social Security Law. 2. An action to recover money paid by collector of revenue for the county in connection with employers' contributions under the Social Security Act must be maintained within five years.
36-71			Withdrawn
38-71	Jan 27		Opinion letter to the Honorable Harold L. Volkmer
40-71			Withdrawn
43-71	Jan 14		Opinion letter to the Honorable John E. Parrish
44-71	May 11		Opinion letter to Mr. Joseph Jaeger, Jr.
47-71	Jan 21		Opinion letter to the Honorable Thomas A. Walsh
48-71	May 7	BONDS. COUNTY DUMP GROUNDS.	A third class county may levy taxes and issue bonds (but not revenue bonds) for the purposes of acquiring land and equipment and maintaining a county dumping ground. The levy may be over the maximum rate allowed by Section 137.065(1), RSMo 1969, if the provisions of Section 137.065(2), RSMo 1969, are complied with.
49-71			Withdrawn
50-71	Mar 29		Opinion letter to Mr. Joseph Jaeger, Jr.
51-71	Nov 24		Opinion letter to the Honorable Vernon Bruckerhoff
52-71	Mar 29	ELECTIONS. BALLOTS.	When absentee ballots omit the name of a candidate of one party for an office and contain in place of such name, the name of another individual, who is not a candidate, that all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate.
53-71	Apr 19	SCHOOLS. ELECTIONS. TAXATION (SCHOOLS).	Section 164.021, RSMo 1969, provides that a certain number of voters in a school district may petition the school board requesting that a proposal to raise the school tax rate be submitted to the voters. Upon receipt of a petition in compliance with subsection 1 of Section 164.021, RSMo 1969, the school board must determine the rate of

			taxation necessary to be levied in excess of the authorized rate but the board is not required to submit the rate, if any, proposed in the petition.
54-71			Withdrawn
55-71	May 27	STATE COLLEGES. CONSTITUTIONAL LAW.	Section 39(3), Article III, Missouri Constitution of 1945, prohibits the Missouri General Assembly from authorizing Northeast Missouri State College to pay for extra work done by a contractor which was not provided for by the contract between the college and the contractor.
56-71	May 12		Opinion letter to Mr. Howard L. McFadden
57-71	Jan 25	ELECTIONS. ABSENTEE VOTING.	A county clerk is not authorized to deliver an absentee ballot in person at a place other than his office and that the delivery of an absentee ballot in person at a place other than his office is a violation of the absentee voting laws of Missouri and constitutes a misdemeanor.
58-71	Jan 8	SCHOOLS. JUNIOR COLLEGE DISTRICTS. CONSTITUTIONAL LAW.	1. The amendments to Section 11(c) of Article X of the Missouri Constitution adopted by the voters on November 3, 1970, apply to junior college districts organized under Sections 178.770 through 178.890, RSMo 1969. 2. Pursuant to Section 11(c) of Article X of the Missouri Constitution, the tax rate for school purposes approved by the voters of a junior college district in 1970 will apply in 1971 (a) provided the board of trustees of the district does not propose a higher tax rate for 1971, and does not levy a lower tax rate for 1971 than that approved by the voters for 1970, or (b) if the board of trustees proposes a higher tax rate for 1971 than that approved by the voters for 1970, and the proposal is defeated by the qualified voters of the district.
60-71	Apr 9	MOTOR VEHICLES. MOTOR VEHICLE SAFETY RESPONSIBILITY.	The Director of Revenue is required to accept and process motor vehicle accident reports involving death, personal injury or property damage in excess of one hundred dollars submitted at any time by persons connected with such accidents.
61-71	Mar 16	MOTOR VEHICLES.	Municipalities have no authority to establish vehicular weight or size regulations imposing greater restrictions than state law.
62-71	Apr 9	TAXATION (INHERITANCE).	The bequests to Father Edward Roche, Father Gregory Wooler and Sister Reginald Wollenshlager provided in Article III, (3), (4) and (5), respectively, of the Last Will and Testament of Bess E. Wollenshlager, deceased, are not exempt from Missouri Inheritance Tax by virtue of Section 145.100, RSMo 1969. They constitute taxable transfers under Section 145.020, RSMo 1969.
64-71	June 14		Opinion letter to Mr. Joseph Jaeger, Jr.

65-71			Withdrawn
66-71	May 7		Opinion letter to James A. Mertz, D.C.
67-71	Mar 25	CHIROPRACTIC LICENSES.	1. The State Board of Chiropractic Examiners has the authority not to renew a license to practice chiropractic for non-compliance with the two-day educational requirement or non-payment of the ten dollar annual renewal fee as required by subsection 2 of Section 331.050, RSMo 1969. 2. If there are other allegations or complaints which justify disciplinary action against a licensee, the State Board of Chiropractic Examiners must file a complaint with the Administrative Hearing Commission as provided in Section 161.282, RSMo 1969.
70-71	Dec 2		Opinion letter to the Honorable Robert A. Young
71-71	Jan 21		Opinion letter to Mr. J. E. Riney
72-71	Feb 23	WORKMEN'S COMPENSATION.	The State of Missouri is required to be a self-insurer with respect to employees of the Division of Mental Health under the Workmen's Compensation Law.
73-71	Feb 11	COUNTY COURT. CITIES, TOWNS & VILLAGES. INCORPORATION OF CITIES.	A petition to incorporate a city or town under Section 72.080, RSMo 1969, may be filed at any time but a city or town may not be incorporated under this section unless and until the county court is satisfied that the petition is signed by a majority of the taxable inhabitants at the time the town or city is declared to be incorporated.
75-71	Feb 1		Opinion letter to Mr. Joseph Jaeger, Jr.
76-71	Jan 13		Opinion letter to Mr. Joseph Jaeger, Jr.
78-71	May 21	RETIREMENT. RETIREMENT SYSTEM. PENSION. STATE EMPLOYEES' RETIREMENT SYSTEM.	Pursuant to the provisions of subsection 3 of Section 104.380, RSMo 1969, an individual electing to retire as a member of the Missouri State Legislature is not entitled to a refund of contributions made by said member as an employee of the state prior to six years service as a member of the legislature.
80-71	June 23	COUNTY PURCHASES. COUNTY CONTRACTS.	Section 50.660, RSMo 1969, which requires the solicitation of bids for certain county purchases applies to third class counties.
82-71	Jan 5		Opinion letter to the Honorable C. M. Bassman
85-71	Feb 5	COMPENSATION. COUNTY TREASURER.	The county treasurer in a third class county not under township organization is entitled to the additional compensation provided for in Section 54.275, RSMo 1969, in addition to the compensation provided for under Section 54.260, RSMo 1969.
87-71	Jan 28		Opinion letter to the Honorable James G. Gregory
88-71	Apr 1	JAILS. COUNTY COURT.	The County Court of Cape Girardeau County may, pursuant to Section 49.310, RSMo, erect a jail at the site referred to as "The Cape

		COUNTY JAILS.	Girardeau County Farm" located in the City of Cape Girardeau.
89-71	Jun 23		Opinion letter to the Honorable John J. Johnson
90-71			Withdrawn
91-71	May 26		Opinion letter to the Honorable William E. Robinson
93-71	Jan 12		Opinion letter to the Honorable E. J. Cantrell
94-71	Jan 18		Opinion letter to Mr. J. E. Riney, Chairman
95-71	Apr 6		Opinion letter to the Honorable D. R. Osbourn
96-71	Mar 30	BALLOTS. ELECTIONS. CANDIDATES.	Candidates who file as "independent" candidates in the primary election appear under the designation "nonpartisan" on the primary election ballot; and if they are successful in being nominated at the primary election, they appear under the designation "nonpartisan" on the general election ballot. Candidates who are nominated by petition appear under the designation of the party name shown on the petition. A candidate nominated by petition as an "independent" candidate would appear under the "independent" designation.
97-71	Mar 15	SCHOOLS. BONDS.	1. A school board may allocate to debt service for payment of bonds issued by the district part of the \$1.25 which it can levy without voter approval pursuant to Section 11(b) of Article X, Missouri Constitution; 2. Should a future school board determine that the entire \$1.25 must be allocated to the current operational expenses of the district, this school board must, pursuant to Section 164.161, RSMo 1969, provide for the collection of an annual tax sufficient to pay the interest and principal on the bonds and to retire them within twenty years.
98-71	Mar 23		Opinion letter to the Honorable W. Clifton Banta, Jr.
99-71	Feb 3		Opinion letter to the Honorable Ray S. James
101-71	May 21		Opinion letter to the Honorable E. J. Cantrell
103-71	July 19	SCHOOLS. INTEREST.	1. A six-director school district which has exhausted its working capital or anticipates such exhaustion in the near future has the power without obtaining voter approval to borrow money to meet its current operating expenses, provided its unencumbered anticipated revenue for the calendar year is sufficient, at the time the loan is made, to repay the principal and interest on the indebtedness. 2. The highest rate of interest at which a six-director school district may contract to borrow money is eight percent per annum. There are no restrictions as to maturity date or form of obligation. However, Section 432.070, RSMo 1969, which governs a school district's contracts in general, is applicable to a six-director school district's contract to borrow money.
104-71			

104-71	Jan 22	DENTISTS. SURGERY.	A dentist may legally perform biopsies and diagnose malignant growths of surfaces inside the oral cavity.
105-71	Jan 20		Opinion letter to the Honorable Ray Lee Caskey
106-71			Withdrawn
109-71	Apr 15		Opinion letter to the Honorable Peter H. Rea
110-71	Jan 20		Opinion letter to the Honorable Don Owens
111-71	Apr 15	TAXATION (INCOME).	Section 143.140, RSMo 1969, does not authorize a deduction from gross income, in determining net income for income tax purposes, of amounts paid into a retirement plan trust by self-employed individuals.
113-71			Withdrawn
114-71	Feb 5		Opinion letter to the Honorable Robert H. Martin
115-71	Feb 11	TOWNSHIPS. OFFICERS. TOWNSHIP OFFICERS. ELECTIONS.	The office of trustee and ex officio treasurer of a township is incompatible with the office of township collector. Section 111.091, RSMo 1969, does not authorize the county court to establish an election district which consists of two entire townships.
116-71	Feb 11	COUNTIES. COUNTY COURT.	The action of the county court of Madison County donating five hundred dollars to a Joint Committee for Transportation for the purpose of opposing a proceeding before the Interstate Commerce Commission for abandonment of a railroad was illegal and void.
117-71			Withdrawn
118-71	Apr 26	COURTS. JUVENILES.	1. In counties of the second class in which there is no judge assigned exclusively to juvenile matters, the courtroom designated for juvenile cases may be used by the court for other matters when the juvenile court is not in session. 2. The county court of a second class county may construct a single building containing completely separate units for housing the juvenile detention center and the county jail if the building is constructed and arranged so that a child being detained does not come in contact at any time or in any manner with adults being held in the county jail.
119-71	Feb 19	CONSTITUTIONAL LAW. GENERAL ASSEMBLY.	Bills introduced at one session of the General Assembly may be considered at subsequent sessions of the same General Assembly provided the rules of the house concerned permit consideration of the bills and the bills concern subject matter which constitutionally can be considered at such sessions. However, bills introduced in one General Assembly do not carry over to a subsequent General Assembly.
120-71	Mar 12		Opinion letter to Mr. J. M. Wilson
122-71	Apr 19	COUNTY TREASURER.	As to the amounts returned by the State Director of Revenue, collected

		TAXATION (INTANGIBLE).	as intangible taxes, these amounts are to be set apart and credited to the specific levy, in pro rata amounts, which provides the political subdivision's taxable basis. It is not incumbent upon the county treasurer of DeKalb County to set apart and credit to the specific levy providing the taxable basis the pro rata amount to be returned to each political subdivision within DeKalb County.
123-71	Mar 23	COUNTY OPTION DUMPING GROUND LAW. COUNTY COURT. LICENSES. DUMP GROUNDS.	The county court of a second class county has a ministerial duty to renew a license once issued under the County Option Dumping Law, on the tender by the licensee of the annual fee of twenty-five dollars, (1) To renew a license to operate a disposal area under the County Option Dumping Law, which has initially complied with the application procedure set out in Section 64.467, and 64.470(1), and (2) the licensee need but pay the annual fee of twenty-five dollars.
124-71	Mar 2	SCHOOLS.	Subsection 1 of Section 162.096, RSMo 1969, does not authorize the State Board of Education to reconsider after January 15, 1971, assignments of non-operating districts lawfully made prior to that date.
125-71	Mar 16		Opinion letter to Mr. Walter G. Sartorius
126-71	Apr 12	CITIES, TOWNS & VILLAGES.	The alternative procedure authorized in Section 72.085, RSMo 1969, for incorporating cities in any second class county or first class county having a charter form of government, may not be used in place of the procedure prescribed in Section 72.100, RSMo 1969, for the incorporation of unincorporated areas situated on the county line and in two counties.
127-71	May 13	MAGISTRATES. POPULATION.	An additional magistrate created under the provisions of Section 482.010, RSMo 1969, does not become a regular magistrate under said section when the county becomes entitled to another regular magistrate because of an increase in the number of the inhabitants of the county. When the county becomes entitled to a second magistrate because of a population increase indicated by the 1970 census, the governor has the authority to appoint a regular magistrate on or after July 1, 1971, who serves until the next general election. If such regular magistrate is not appointed, the temporary magistrate has authority to continue to act until a regular magistrate is chosen at the next general election and duly qualifies and takes office. The regular magistrate elected at the November 1972 general election holds office for an unexpired term ending December 31, 1974.
128-71	May 6	FIRE PROTECTION DISTRICTS.	1. A fire protection district may provide emergency assistance and first aid even though emergency ambulance service is not established under Section 321.225 RSMo 1969. 2. The board of directors of a fire protection district organized prior to October 13, 1969, under Section 321.510 to 321.715 RSMo 1959 as amended, continue in office until

			the expiration of their terms and no successors shall be elected for the two members whose terms first expire. 3. The board of directors should certify the tax levy as provided under Section 321.250 RSMo 1969 to the county court of each county in which the fire protection district is located and the taxes should be collected by the officials whose duty it is to collect taxes for such counties.
129-71	Jan 29		Opinion letter to the Honorable George P. Dames
130-71	Apr 6		Opinion letter to the Honorable Vernon Bruckerhoff
131-71	Apr 15	CONSTITUTIONAL LAW. REFERENDUM. TAXATION (INCOME).	1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly, if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum. 2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.
132-71	June 3		Opinion letter to the Honorable Howard E. Hines
133-71	Oct 28	SCHOOLS. CONSTITUTIONAL LAW.	1. The parent, guardian or other person having charge, control or custody of a child under the age of seven or over sixteen does not come within the provisions of Section 167.031, RSMo 1969, relating to compulsory school attendance on a full-time basis. However, a person standing in the parental relation to a child between sixteen and eighteen years of age who has not completed the elementary school course in the public schools of Missouri, or its equivalent, does come within the provisions of Section 167.051(2), RSMo 1969, relating to compulsory attendance at a part-time school. 2. All children in the State of Missouri between the ages of six and twenty years have a constitutional right to a public school education. All children who are entitled to a public school education as a matter of right but who do not fall within the age group of the Compulsory School Attendance Law may attend a public school on a part-time basis subject to a school district's reasonable rules and regulations. 3. Subject to reasonable rules and regulations applicable to all students, public school authorities operating an area vocational school must enroll a private school student who desires to participate in the vocational instruction offered at the school outside of the regular school day if the student is within the age group of children entitled to a public education as a matter of right. Shared time instruction in area vocational schools whereby students between the ages of sixteen and twenty attend the public vocational school for part of the regular school day and take the remainder of their courses at a church related school does not violate either the statutes or Constitution of Missouri or the United States

			Constitution.
134-71	Feb 8	BONDS. INDUSTRIAL DEVELOPMENT. DIVISION OF COMMERCE AND INDUSTRIAL DEVELOPMENT.	A municipality which issues and sells industrial development revenue bonds incurs no liability to pay for said revenue bonds other than the responsibility to apply the revenue received from the project for which the bonds were sold to retiring the bonds.
140-71	July 6	CONSTITUTIONAL LAW. HOUSING DEVELOPMENT. TAXATION.	Chapter 215, RSMo 1969, establishes the Missouri Housing Development Commission for a valid public purpose, that is, facilitating the provision of housing for persons and families of low and moderate income who are unable to obtain adequate housing through ordinary commercial means and that such legislation does not contravene any provision of the Missouri Constitution.
142-71	Feb 24		Opinion letter to the Honorable Richard G. Steele
143-71	May 22		Opinion letter to the Honorable Ray S. James
144-71	Nov 26	SCHOOLS.	(1) A pupil between the ages of seven and sixteen enrolled in a nonpublic school may also attend courses on a part-time basis in a public technical-vocational school so long as the attendance at the public school is in addition to attendance for the six-hour school day at the nonpublic school. Such part-time attendance would be subject to reasonable rules and regulations on the part of the public school district. (2) The Compulsory School Attendance Law, Section 167.031, RSMo 1969, as interpreted by the Missouri Supreme Court in the <u>Wheeler</u> decision, does not require that a pupil attend one school for six consecutive hours each day provided that a total of six hours each day is spent in attendance at one school.
146-71	Mar 2		Opinion letter to Arthur L. Mallory
147-71	Mar 3		Opinion letter to Arthur L. Mallory
149-71	June 15	CULTURAL DISTRICTS.	House Bill No. 23, of the Seventy-fifth General Assembly, Section 184.350-184.388, V.A.M.S., can be amended to place the establishment of subdistricts in addition to the three subdistricts now established in the Metropolitan St. Louis Cultural District before the voters of St. Louis City and County for approval or rejection and for purposes of funding.
150-71	Apr 28	INSURANCE. FARMERS MUTUAL INSURANCE COMPANY.	A farmers mutual insurance company is a private commercial enterprise and may not be permitted to occupy office space in the county courthouse for the conduct of its business.

152-71	July 7		Opinion letter to the Honorable Barnes Griffith
153-71	Feb 19		Opinion letter to the Honorable Tony Heckemeyer
154-71	June 14		Opinion letter to the Honorable Joe D. Holt
155-71	Apr 1		Opinion letter to Mr. Gene Sally, Director
156-71	May 3	SCHOOLS. SCHOOL BUSES.	A six-director school district in the State of Missouri may contract with a private or parochial transportation system to provide the transportation services which the board is authorized to furnish pursuant to Section 167.231, RSMo 1969.
158-71	Mar 10		Opinion letter to the Honorable Thomas A. Walsh
161-71	Oct 12		Opinion letter to the Honorable Robert S. Drake, Jr.
163-71	Apr 1	COMPENSATION. COUNTY TREASURER.	The county treasurer of a county which became a second class county January 1, 1967, said treasurer having been appointed by the Governor in 1971 to serve until a duly elected county treasurer can be installed on January 1, 1973, pursuant to Section 54.010, sub. 2, RSMo 1969, is filling out an unexpired term of office and, as such, is entitled to receive only the compensation provided by law for the treasurer of a second class county who was elected at the November 1968 election.
164-71	May 4		Opinion letter to the Honorable Hal E. Hunter
165-71	Apr 8	COUNTY COLLECTORS. COMPENSATION.	In regard to determining the rates of commissions of county collectors of third class counties whose offices fall within subsection 14(a) of Section 52.260, RSMo 1969, insofar as county collectors are concerned: 1. The phrase "tax bills placed in his hands" as referred to in subsection 14(a) of Section 52.260, RSMo 1969, does not include back taxes for prior years. 2. A collector is entitled to a commission for collecting back taxes for prior years only in accordance with Section 52.290, RSMo 1969.
166-71	Feb 18		Opinion letter to the Honorable Earl L. Sponsler
167-71	Mar 1	GENERAL ASSEMBLY. REORGANIZATION PLANS. CONSTITUTIONAL LAW. GOVERNOR.	1. Reorganization Plan No. 1 of 1971 providing for a Board of Environmental Control does not exceed the authority conferred by Section 26.540, RSMo 1969. 2. Reorganization Plans Numbers 2, 3 and 4 of 1971, placing the employees of certain agencies under the merit system, involve "changing the organization" of state agencies within the meaning of Section 26.540, RSMo 1969, as provided by such section. 3. Sections 26.500 to 26.540, inclusive, RSMo 1969, empower the Governor to remove from the merit system personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for

			reorganization. 4. Section 26.530, RSMo 1969, does not constitute an unconstitutional delegation of legislative power to the executive branch. 5. The Governor may comply with the provisions of Section 26.530, RSMo 1969, in submitting a reorganization plan to the legislature by delivering such plan to the secretary of the senate and the chief clerk of the house during a regular session of the legislature.
168-71	Mar 16		Opinion letter to the Honorable James N. Foley
169-71	June 7		Opinion letter to the Honorable Jack E. Gant
171-71	May 4	SCHOOLS. COMPENSATION. CONSTITUTIONAL LAW.	In school districts in which a school board is authorized by Section 168.191, RSMo 1969, to enter into a contract with a superintendent of schools for the school district for a period of not to exceed three years, Section 38(a) of Article III, and Section 39(3) of Article III, Missouri Constitution, prohibit such school board and the superintendent from terminating a partially performed three year contract and executing a new three year contract providing for the performance of the same duties at a greater compensation when the only reason for so doing is to increase the superintendent's compensation before the expiration of the current contract.
172-71	May 14	TAXATION (EXEMPTIONS).	Where real estate is conveyed to a nonprofit organization, and is inhabited as a residence by the grantor by virtue of a retained life estate, or by other persons by virtue of a lease from the non-profit organization, the real estate is not exempt from taxation under Article X, Section 6 of the Constitution of Missouri and Section 137.100, RSMo 1969. Where the entire fee is subject to taxation, the leasehold is included in the value of the fee, and the lessor is liable for the tax. Where a life estate is retained and the entire fee is taxed, the life tenant has the duty of paying the tax.
175-71	Feb 24		Opinion letter to the Honorable Donald L. Manford
176-71	Apr 16		Opinion letter to the Honorable Richard Southern
177-71			Withdrawn
178-71	July 19	SCHOOLS. TEACHERS.	A school board of a six-director school district may terminate a probationary teacher's contract pursuant to the terms of subsection 2 of Section 168.126, RSMo 1969, if a written statement is delivered to the probationary teacher setting forth each and every area of incompetency in which the board desires improvement in sufficient detail so as to permit the teacher to have an opportunity to correct the alleged faults within ninety days. If the alleged incompetency is not corrected, the board may, pursuant to subsection 2 of Section 168.126, RSMo 1969, terminate the employment of the probationary teacher immediately or at the end of the school year.

180-71	May 17		Opinion letter to the Honorable Charles E. Valier
182-71	May 5	SCHOOLS. NATIONAL FORESTS.	A junior college district located partly or wholly within or adjacent to Clark National Forest in the county in which such forest is located is eligible under Section 12.070, RSMo 1969, to share in the funds received by the state from the federal government pursuant to the National Forest Reserve Act.
185-71	Mar 12		Opinion letter to the Honorable Harold Dickson
186-71	July 9	SCHOOLS. TEACHERS.	When two or more school districts consolidate and form a new school district, the new consolidated district should give the teachers under contract with each component district credit, in accordance with the Teacher Tenure Act, particularly Section 168.104, RSMo 1969, for all years of employment in a component district.
188-71	Mar 29		Opinion letter to the Honorable Samuel J. Short, Jr.
189-71	Mar 10		Opinion letter to the Honorable Donald B. Clark
191-71	Mar 23		Opinion letter to the Honorable Walter L. Meyer
192-71	Mar 11		Opinion letter to the Honorable John J. Johnson
193-71	June 1	RETIREMENT. SOCIAL SECURITY.	The Missouri Local Government Employees' Retirement System is an instrumentality of the state and/or one or more of its political subdivisions within the meaning of the Social Security Act.
194-71			Withdrawn
195-71	Apr 28		Opinion letter to Colonel E. I. Hockaday
197-71	Apr 21		Opinion letter to Mr. Richard M. Miller
200-71	Mar 30		Opinion letter to the Honorable Don Randall
202-71	Apr 9		Opinion letter to the Honorable Dee Wampler
203-71	May 10	COUNTY FINANCIAL STATEMENT. COUNTY COURT.	The cost of preparation and publishing the financial statement as required in Section 50.800 and 50.810, RSMo 1969, is to be paid by the county and the cost thereof not to be pro-rated to the various funds.
204-71			Withdrawn
207-71	May 20	PODIATRY.	Determining the proper arch support needed to make a shoe fit properly and placing such support in the shoe does not constitute the practice of podiatry by a shoe salesman.
210-71	Apr 9		Opinion letter to the Honorable George P. Dames
211-71	May 20		Opinion letter to the Honorable Bill J. Crigler
213-71	Oct 27	CRIMINAL LAW.	1. An indigent person may not be held in or committed to jail for

		CRIMINAL PROCEDURE. FINES. PRISONERS. JAILS.	failure to make immediate payment of a fine if he lacks the means to make such payment. 2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay. 3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment. 4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony. 5. Courts have authority to permit the payment of fines in installments. 6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine. 7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.
215-71			Withdrawn
218-71	Mar 22	PREVAILING WAGE LAW. STATE HIGHWAY COMMISSION.	The State Highway Commission cannot include in contracts for highway construction involving federal aid a provision as to wage determination by the Missouri Department of Labor and Industrial Relations during the period of the suspension of the Davis-Bacon Act and related federal acts pursuant to the presidential proclamation of February 23, 1971.
219-71	Mar 30		Opinion letter to the Honorable Alden S. Lance
220-71	Dec 21		Opinion letter to the Honorable James S. Stubbs
221-71	Apr 28	TAXATION (INCOME).	Interest received upon a promissory note executed by an individual borrower which note is guaranteed by the United States government is not exempt from Missouri state income tax under the provisions of Section 143.150, RSMo 1969, as interest upon the obligations of the United States or its possessions.
227-71	Apr 2	ASSESSMENTS. COMPENSATION. COUNTY OFFICERS. STATE TAX COMMISSION.	The assessed valuation of real and tangible personal property for Sullivan County for the year 1970 is \$19,637,081.
228-71	Mar 29		Opinion letter to the Honorable James E. Godfrey
229-71	May 6		Opinion letter to the Honorable John W. Briscoe
231-71	Nov 11	LABOR. FEMALE LABOR.	1. Title VII of the Civil Rights Act of 1964 barring discriminatory employment practices with respect to woman workers has superseded Section 290.040, RSMo 1969, limiting the hours of labor of women employed by employers subject to the provisions of the federal act. 2. Those employers not covered by the provisions of Title VII of the Civil

			Rights Act of 1964 will remain subject to the maximum hours limitation of Section 290.040, RSMo 1969, and the Division of Industrial Inspection will continue to have the responsibility of enforcement in accordance with Section 290.070, RSMo 1969.
232-71	Apr 1		Opinion letter to the Honorable Truman E. Wilson
233-71	Apr 1		Opinion letter to the Honorable Allan G. Mueller
234-71	Aug 18		Opinion letter to the Honorable Les Langsford
235-71			Withdrawn
236-71	Oct 21	SCHOOLS. ELECTIONS.	A board of directors of a six-director school district has no authority to prescribe rules governing the selection of candidates for election to membership on such board.
237-71			Withdrawn
239-71	May 13	WATER POLLUTION.	The Missouri Water Pollution Board does not have the authority to require as a condition of a permit for the construction and operation of a water treatment facility which will at present meet the requirements of Chapter 204, RSMo, the Missouri Water Pollution Law, the posting of financial security to ensure future treatment facilities when such additional facilities will be required.
240-71	Apr 9		Opinion letter to the Honorable George A. Ulett, M.D.
241-71	May 17	BANKS. TAXATION. CONSTITUTIONAL LAW.	The provisions of Section 148.110, RSMo 1969, do not contravene any provision of the Constitution of Missouri and are valid.
242-71	July 6		Opinion letter to Mr. Joseph Jaeger, Jr.
244-71	Apr 8		Opinion letter to the Honorable Kenneth J. Rothman
248-71	Apr 26		Opinion letter to the Honorable Maurice Schechter
249-71	Nov 24	SCHOOLS.	When a six-director district lying wholly within Jackson County and partly within Kansas City has a school election on a day in which general, special or primary elections are not being held statewide and no election is scheduled in another political subdivision within the school district, Section 162.351, RSMo 1969, does not require either the Kansas City Board of Election Commissioners or the Jackson County Board of Election Commissioners to conduct the school election. Also, Section 162.361, RSMo 1969, does not require voters to register before voting in a school election held in a six-director school district lying only within Jackson County and partly within the city limits of Kansas City for the reason that the school district does not lie wholly within

			the limits of Kansas City. However, any six-director school district so located which contains a city having not less than ten thousand nor more than fifty thousand inhabitants shall require that all school elections be conducted in accordance with the registration laws applicable to general elections within the city. All voters in the district living outside the limits of such a city must also register to vote if required to register in a general election.
250-71	Apr 29	LEGISLATURE. GENERAL ASSEMBLY. CONSTITUTIONAL LAW. INITIATIVE & REFERENDUM. CONSTITUTIONAL AMENDMENT.	The General Assembly may not constitutionally condition ratification of an amendment to the United States Constitution on approval by the voters.
251-71	Dec 22		Opinion letter to the Honorable Earl L. Sponsler
252-71	Oct 27	CRIMINAL LAW. CRIMINAL PROCEDURE. FINES. PRISONERS. JAILS.	1. An indigent person may not be held in or committed to jail for failure to make immediate payment of a fine if he lacks the means to make such payment. 2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay. 3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment. 4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony. 5. Courts have authority to permit the payment of fines in installments. 6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine. 7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.
253-71	May 4		Opinion letter to the Honorable Ellis Young
255-71	July 9	TAXATION (Cities, Towns and Villages). ASSESSMENTS.	(1) When the provisions of Section 137.073, RSMo 1969, become applicable because of an increase in the assessed valuation of property in a county, the lowering of the rate of a city library tax levy shall be only to the extent necessary to produce substantially the same amount of taxes for the library as previously estimated to be produced by the original levy, and the lowering of the rate of levy shall be subject to the limitation that the levy for the library shall not be reduced below a point that would entitle it to participate in state funds. (2) Revising the rates of levy so that the rate of levy applicable to the library will produce substantially less than the amount of taxes previously

			estimated to be produced by the original levy and so that rates of levy for other city purposes will produce substantially more taxes than had been estimated to be produced by the original levy is not in conformity with Section 137.073, RSMo 1969, even though the total city taxes produced by the revised rates of levy may equal the total taxes previously estimated to be produced by the original levy.
257-71			Withdrawn
259-71	June 30		Opinion letter to Mr. Dexter D. Davis
261-71			Withdrawn
262-71	Sept 16		Opinion letter to the Honorable Donald L. Manford
263-71	May 5		Opinion letter to the Honorable Richard M. Webster
264-71	June 22		Opinion letter to the Honorable John W. Reid, II
265-71	Oct 12		Opinion letter to the Honorable Dee Wampler
268-71	Oct 6	SCHOOLS. TEACHERS.	The board of education of a six-director school district cannot make the contract between the school district and a permanent teacher, who has reached age 65, subject to a time limitation of one year.
269-71	May 13	SCHOOLS. TEACHERS.	A teacher who served eleven years in a school district from 1954 through 1965, before leaving the employment of that district, and who returned to the district four years later in 1969, and who was reemployed for two successive years after returning, qualified as a permanent teacher prior to leaving the employment of the district and, therefore reemployment for the first school year did not constitute an indefinite contract but when the teacher was employed for the succeeding year, the employment constituted an indefinite contract, pursuant to Section 168.104(4), RSMo 1969.
270-71	May 19	COOPERATIVE AGREEMENTS. WATER SUPPLY DISTRICTS. CITIES, TOWNS AND VILLAGES.	A public water supply district organized under the provisions of Sections 247.010 to 247.220, RSMo 1969, and a city having a waterworks system are authorized under Section 16 of Article VI of the Missouri Constitution and Sections 70.210, RSMo 1969 et seq. to enter into a cooperative agreement for the joint development and financing of a common water supply source.
273-71	June 7	SIGNATURES. COUNTY WARRANTS.	A county warrant may be executed by a county judge by the use of the facsimile signature of the county judge who is required to sign the warrant provided the manual signature of said judge has been properly filed with the Secretary of State.
274-71	May 4		Opinion letter to the Honorable Arlie H. Meyer

275-71	June 14		Opinion letter to the Honorable James A. Noland, Jr.
278-71	May 6		Opinion letter to the Honorable Joe A. Johnson
280-71			Withdrawn
281-71			Withdrawn
282-71	Sept 22		Opinion letter to the Honorable William S. Brandom
284-71	June 28	ASSESSORS. COLLECTORS. ST. LOUIS CITY.	Neither the collector nor assessor of the City of St. Louis may charge fees for issuing statements certifying that no personal property taxes are owing for the preceding year to persons who are entitled to such statements under Section 301.025, RSMo 1969.
285-71	Nov 12		Opinion letter to Mr. G. L. Donahoe
286-71	May 26		Opinion letter to the Honorable Gene McNary
287-71	July 19		Opinion letter to Mr. Charles O'Halloran
289-71	Sept 14		Opinion letter to Mr. O'Garlan C. Ricks
290-71			Withdrawn
292-71	June 25	BOAT COMMISSION. CRIMINAL LAW.	The Missouri Boat Commission is authorized to establish speed limit zones on the waterways of Missouri and to enforce compliance with such regulations.
294-71			Withdrawn
296-71	June 15		Opinion letter to the Honorable Robert S. Wiley
297-71	June 23		Opinion letter to the Honorable James E. Spain
298-71	Nov 24	SEX. LABOR. HUMAN RIGHTS. FEMALE LABOR.	Chapter 296, RSMo 1969, empowers the Missouri Commission on Human Rights to receive, investigate, conciliate and prosecute complaints of unlawful employment practices based on sex, and to conduct hearings and issue such orders as are deemed appropriate in each case.
299-71	June 14	UTILITIES. PREVAILING WAGES. CITIES, TOWNS & VILLAGES.	The installation of publicly owned lighting equipment for streets and thoroughfares in municipalities by Union Electric or any other company pursuant to contract with such municipalities involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act. Installation of lighting equipment for streets and thoroughfares by Union Electric or another public utility pursuant to an agreement with a municipality whereby ownership of such equipment is transferred to the utility company with the agreement that such

			ownership will be returned to the municipality upon completion of the installation involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act.
300-71	June 3		Opinion letter to the Honorable Samuel J. Short, Jr.
302-71	May 27		Opinion letter to Dr. Arthur L. Mallory
304-71	July 20	ELECTIONS. NURSING HOME DISTRICTS.	1. It is mandatory that the board of directors of a nursing home district, which on three separate occasions refused to approve a bond issue for the construction of a nursing home, submit to the voters the proposition of the dissolution of said district. 2. Elections held prior to the enactment of Section 198.360, RSMo 1969, shall be considered as being within the provisions of this section in determining the number of elections in which the voters have refused to approve a bond issue.
305-71	June 17		Opinion letter to the Honorable Carl R. Noren
308-71	Aug 31		Opinion letter to the Honorable E. J. Cantrell
309-71	June 4		Opinion letter to the Honorable Arlie H. Meyer
310-71	Aug 27		Opinion letter to Mr. Joseph Jaeger, Jr.
311-71	June 28	SCHOOL DISTRICTS. BOUNDARIES.	Consolidation of municipalities does not affect boundaries of six-member school district including one of the municipalities to be consolidated.
313-71	Aug 20		Opinion letter to the Honorable Edna Eads
314-71	Sept 29		Opinion letter to Mr. Robert L. Dunkeson
316-71	Oct 13	SCHOOL DISTRICTS. SCHOOLS. TEACHERS. CONTRACTS.	A six-director school district in the State of Missouri must rehire a "permanent teacher" as that term is defined in the Teacher Tenure Act, Sections 168.102 to 168.130, RSMo 1969, even if the rehiring of this teacher will result in the school district's receiving a lower classification from the State Board of Education.
318-71	June 17		Opinion letter to the Honorable William S. Brandom
319-71	July 14	CONFLICT OF INTEREST. HOUSING DEVELOPMENT COMMISSION.	The Missouri Housing Development Commission is not disabled from retaining as "managing underwriter" in the marketing of its bonds or notes a firm engaged in the underwriting and investment banking business, which has served as the Commission's financial adviser in the past and which proposes to render further services as financial adviser, without additional compensation, if selected as managing underwriter.
320-71	June 9		Opinion letter to Mr. B. W. Robinson

321-71	July 19	NOTARY PUBLIC.	Section 486.040, RSMo 1969, requires a notary public to have a seal which when used makes an impression on the document on which it is used.
323-71	June 24		Opinion letter to Dr. Arthur L. Mallory
329-71	Oct 7	POULTRY. AGRICULTURE.	1. "The Missouri State Poultry Association" has authority to publish and make available to the public the results of their experiments with poultry in this state. 2. "The Missouri State Poultry Association" members in the performance of their duties are not personally liable for acts not maliciously done.
330-71	June 16		Opinion letter to Mr. William Wright
331-71	Nov 15	AIR CONSERVATION COMMISSION.	1. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to adopt emission control regulations, including limitations on the content of fuels, which will attain and maintain national air quality standards, if the state standards are the same or more stringent. 2. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, and the Constitution of Missouri to enforce without delay the provisions of Chapter 203, RSMo 1969, and standards, rules, and regulations promulgated thereunder, through administrative procedures and injunctive relief. 3. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to abate pollutant emissions on an emergency basis comparable to that available under 42 U.S.C.A., Section 1857d(k). 4. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to provide for the equivalent of a construction permit system by promulgating regulations to require the submission of plans and specifications for approval before any person may construct any facility which will cause air pollution, but that the Commission has no such authority regarding an equivalent permit system for the operation of existing facilities which are the source of air pollution. 5. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, necessary to inspect, conduct tests, and obtain information, including the authority to require record keeping, to determine compliance with emission control regulations. 6. The Missouri Air Conservation Commission does not have any specific authority to require the installation of emission monitoring devices, but does have the authority to require reports from sources of air pollution relating to rate, period of emission and composition of effluent, and to make such information available to the public, unless any such information is "confidential" as defined by Section 203.050.4, RSMo 1969. 7. The State of Missouri has the

			authority to inspect for “air pollution control devices” which may be installed on motor vehicles as a requirement to comply with applicable emission regulations, but whether such regulations and inspections would accomplish the purpose of “enforcing compliance with applicable emission standards” which are federal standards, and whether the preemption provision of 42 U.S.C.A., Section 1857f-6a, has been complied with are questions that only the appropriate federal officials can answer. 8. All the authorities found in questions 1 through 7 have state-wide application.
332-71	June 23		Opinion letter to the Honorable Richard M. Webster
337-71			Withdrawn
341-71	Aug 18	OFFICERS. COMPENSATION. FIRE PROTECTION DISTRICTS.	1. Members of the board of directors of a fire protection district are not entitled to receive compensation for attending more than two regularly called board meetings in any calendar month and this includes a regularly called meeting of the directors of several fire protection districts which have established a consolidated alarm and dispatching service. After September 28, 1971, the effective date of Senate Committee Substitute for House Bill No. 316 of the 76th General Assembly, the members of the board of a fire protection district in a first class county having a charter form of government, may receive compensation for not more than four meetings each calendar month. 2. A member of the board of directors of a fire protection district cannot be employed and paid any additional compensation for services rendered the district in excess of the amount allowed under Section 321.190, RSMo 1969.
342-71			Withdrawn
344-71	June 22		Opinion letter to the Honorable Ronald M. Belt
345-71	Aug 2		Opinion letter to the Honorable Jack J. Schramm
347-71	June 18		Opinion letter to the Honorable E. J. Cantrell
348-71	Oct 19	SIDEWALKS. TAXATION (MOTOR VEHICLE). CITIES, TOWNS AND VILLAGES. MOTOR VEHICLE GASOLINE TAX.	1. The motor vehicle fuel tax funds appropriated to a city under the provisions, of Article IV, Section 30(a) of the Missouri Constitution cannot be used to construct or maintain sidewalks. 2. General revenue funds of a city of the fourth class may be used to construct or maintain sidewalks in the city under Section 88.680, RSMo 1969.

349-71	June 22		Opinion letter to Mr. Gene Sally
350-71	June 17	ELECTIONS. CANDIDATES. LEGISLATORS. SPECIAL ELECTIONS.	The American Party is an "established political party" within the 30th Legislative District of Missouri and has authority to nominate a candidate of such party for the special election to be held in such district June 29, 1971, to fill a vacancy caused by the death of the representative from such district. The tender of a certificate of nomination of a candidate of the American Party for such office made to the Secretary of State June 15, 1971, should be accepted and filed by the Secretary of State.
351-71			Withdrawn
352-71	July 30	CITIES, TOWNS AND VILLAGES. TAXATION (CITIES).	A fourth class city has authority under Senate Bill No. 64 of the 76th General Assembly to provide by ordinance without a vote by the people for a tax levy for municipal purposes of one dollar on the one hundred dollars assessed valuation for the year 1971 if such ordinance is enacted after the effective date of such bill.
353-71	July 13		Opinion letter to the Honorable Ronald R. McKenzie
354-71	Aug 31	LICENSES. MERCHANTS. ITINERANT VENDORS. TAXATION (MERCHANTS AND MANUFACTURERS).	1. That a person, who in the county of his residence opens a place of business for the purpose of the seasonal sale of fireworks, is (a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b) not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo. 2. That a person who is a wholesale supplier of fireworks to retailers, who does not manufacture such fireworks, who is not in a temporary or transient business of selling goods, wares, and merchandise from a structure for the exhibition and sale of such goods, wares, and merchandise, and who does not sell door to door, is: (a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b) not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is not an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo.
356-71	July 19	COUNTIES. WASTE DISPOSAL. DUMPING GROUNDS.	A third class county has the authority pursuant to Section 64.490, RSMo 1969, to operate a county solid waste disposal area. A third class county has the authority to finance the operation of a solid waste disposal area by general obligation bonds but not by revenue bonds.
357-71	July 22	LABOR. DIVISION OF MENTAL	The Division of Mental Health cannot agree with representatives of the employees to make promotions or transfers based upon seniority.

		HEALTH.	
358-71	Dec 23		Opinion letter to Herbert R. Domke, M.D.
359-71	Dec 2		Opinion letter to the Honorable Don Randall
361-71	June 22		Opinion letter to Mr. Jack K. Smith
362-71	Sept 20	CART. COUNTY COURTS. ROADS AND BRIDGES.	Contracts by a county court for the building of roads from funds derived from the County Aid Road Trust Fund cannot be awarded without competitive bidding.
365-71	July 8	ELECTIONS. PRESIDENTIAL ELECTORS.	An individual eighteen years of age is not disqualified from being chosen as a presidential elector for Missouri.
366-71	July 7		Opinion letter to the Honorable David A Dalton
368-71	June 29	STATE BOARD OF EDUCATION. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965. FEDERAL-STATE AGREEMENTS.	Review and certification of application of the State Board of Education for Grant under Title V of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended.
369-71	July 8	LIQUOR. SUNDAY SALES.	It is not necessary for a municipality, which allows the sale of liquor-by-the-drink, to pass an ordinance authorizing Sunday sales of liquor-by-the-drink where such sales are specifically provided for by the state Liquor Control Act. A municipality which allows the sale of liquor-by-the-drink cannot completely prohibit, by ordinance, the sale of liquor-by-the-drink on Sunday within that municipality where such sale is authorized by state law.
370-71	July 1		Opinion letter to the Honorable James C. Kirkpatrick
371-71	June 30		Opinion letter to the Honorable James C. Kirkpatrick
372-71	July 8		Opinion letter to the Honorable James C. Kirkpatrick
373-71	June 30		Opinion letter to the Honorable James C. Kirkpatrick
374-71	July 1		Opinion letter to the Honorable James C. Kirkpatrick
375-71	July 27	BANKS. BRANCH BANKING.	A corporation which is not organized as a bank or trust company does not engage in improper branch banking, in violation of Section 362.105(1), RSMo 1969, by owning a controlling interest in the shares

			of two or more banks or trust companies organized under Chapter 362, RSMo 1969, or predecessor statutes, so long as each bank or trust company is operated and maintained as a distinct financial entity.
377-71	Aug 16		Opinion letter to the Honorable Barnes Griffith
378-71	July 21	COMPENSATION. APPROPRIATIONS. DIVISION OF FINANCE. CONSTITUTIONAL LAW.	The Commissioner of Finance is to set the compensation of employees of the Division of Finance, other than the Commissioner and Deputy Commissioner, at amounts he shall determine notwithstanding the language of Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly purporting to limit the amount salaries may be increased.
379-71			Withdrawn
380-71	Aug 31		Opinion letter to Mr. Dexter D. Davis
381-71			Withdrawn
385-71			Withdrawn
386-71			Withdrawn
387-71	Sept 3	ELECTIONS. MINORS. VOTERS. RESIDENCE.	A student of eighteen years of age or over meeting the necessary constitutional and statutory requirements for voting may: 1) Retain his original residence and register and vote at such place. 2) Establish a residence in a different community and register and vote at such place if, a) The student declares that he has abandoned his original residence and that he does not intend to return to such place; and, b) He declares his intent to establish a residence in the community in which he resides for an indefinite period; and c) Such declarations are consistent with facts which show that such voter has abandoned his original residence and intends to reside in such community.
388-71	Nov 8	PAROLE. NARCOTICS. CRIMINAL LAW. CRIMINAL PROCEDURE. CONTROLLED SUBSTANCES.	(1) The Board or Probation and Parole is compelled by Section 195.220 to continue supervision over a person paroled from the State Department of Corrections who was convicted or selling, giving, or delivering a controlled substance for a period not less than the completion of the original sentence plus five years. (2) The Board of Probation and Parole is without authority pursuant to Section 195.220 to grant final release and issue a certificate of discharge pursuant to Section 549.275(2), RSMo 1969, to any person paroled from the Missouri Department of Corrections who was convicted of selling, giving, or delivering a controlled substance before a period of not less than the completion of that person's original sentence plus five years. (3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance, is not to be given

			credit for parole time as time toward service or his term of imprisonment pursuant to Section 549.275(1), RSMo 1969, and therefore, a person on parole from such a conviction must, on the revocation of the conditions of his parole, serve the remainder of the term set by the original sentence from which he was paroled.
389-71	Aug 16		Opinion letter to Mr. Dexter D. Davis
393-71	Aug 19	PHYSICIANS. STERILIZATION.	Missouri law does not prohibit the performance of voluntary contraceptive human sterilizations by licensed physicians.
394-71	Aug 19	BANKS.	By virtue of Senate Bill No. 146 of the 76th General Assembly, effective September 28, 1971, a bank in an unincorporated community is not prohibited by law from having a drive-in or walk-up facility in that community when such a facility is within four thousand yards of the bank's main banking house even though in measuring that distance the line of measurement crosses through an incorporated city, town or village.
395-71	Sept 30	COUNTIES. TAXATION. TAX ANTICIPATION NOTES.	1. Tax anticipation notes may be issued by a fourth class county equal to but not to exceed ninety percent of the anticipated income and revenue of the county, and the indebtedness created and warrants issued are valid even though all of the anticipated revenue is not collected, and such indebtedness may be paid from surplus revenues received in subsequent years. 2. Taxes for county purposes in a fourth class county may be increased in excess of fifty cents on the one hundred dollars valuation by a two-thirds vote of the electors for a period not to exceed four years. 3. Any county may become indebted in an amount exceeding the annual income and revenue by a two-thirds vote of the electorate not to exceed ten percent of the value of taxable tangible property and issue bonds payable within twenty years.
396-71	Aug 23		Opinion letter to Mr. Robert E. Myers
397-71	Oct 13	MAGISTRATES. PROBATE JUDGES. COMPENSATION.	The effective date of the 1970 decennial census with respect to the determination of magistrate judges and probate judges salaries is July 1, 1971. The effective date for the determination of maximum allowance for probate and magistrate clerks, deputy clerks and employees is July 1, 1971.
399-71	Aug 18		Opinion letter to the Honorable James C. Kirkpatrick
400-71	Dec 7		Opinion letter to Mr. Edwin M. Bode
401-71	Aug 27		Opinion letter to the Honorable Donald L. Manford
402-71	Sept 3		Opinion letter to the Honorable William J. Esely
403-71	Sept 22		Opinion letter to the Honorable Robert A. Young

405-71	Nov 15	LAND SURVEYOR. COUNTY SURVEYORS.	A duly elected county surveyor cannot practice as a land surveyor in this state as defined in Section 327.272, RSMo 1969, unless he has been duly registered as a land surveyor under Chapter 327, RSMo 1969.
406-71	Dec 14	BONDS. SEWERS.	A sewer district in a second class county organized pursuant to Sections 249.760 through 249.810, RSMo 1969, may issue revenue bonds in the manner provided by Section 249.800, RSMo 1969.
407-71	Dec 10		Opinion letter to Mr. Carl R. Noren
408-71	Nov 17		Opinion letter to Mr. William Y. McCaskill, C.L.U.
409-71	Nov 11	BONDS. LANDFILLS. CITIES, TOWNS AND VILLAGES.	A fourth class city may issue general obligation bonds for the purpose of acquiring land and developing the same for a landfill to be used for the disposition of garbage, trash, refuse matter and municipal waste and that the landfill may be outside the corporate limits of the city with no restriction on the distance from the city.
415-71	Dec 21	COUNTY HEALTH CENTER. PROSECUTING ATTORNEY. SHERIFFS. DEPUTY SHERIFFS.	The trustees of the Taney County Health Center may appoint personnel on a full or part-time basis to investigate and enforce violations of environmental laws and regulations.
416-71	Sept 16		Opinion letter to the Honorable Donald L. Manford
417-71			Withdrawn
418-71	Dec 6		Opinion letter to Mr. Joseph Jaeger, Jr.
419-71			Withdrawn
420-71	Nov 24		Opinion letter to the Honorable Robert B. Paden
422-71	Oct 12		Opinion letter to the Honorable John J. Johnson
423-71	Nov 18	MENTAL HEALTH. SEARCHES AND SEIZURES. CONSTITUTIONAL LAW. STATE EMPLOYEES.	The Division of Mental Health and the superintendents of the facilities within such Division may promulgate reasonable rules requiring employees of the Division or of such facilities to submit packages and automobiles on facility premises to inspection. Employees who refuse to permit such a search are subject to disciplinary action including discharge.
424-71	Oct 13	PENSIONS. PROBATE JUDGES. MAGISTRATES. COMPENSATION.	The compensation of a retired probate judge ex-officio magistrate of a county whose population by the 1970 decennial census has increased to over 30,000 inhabitants, who has been appointed a special commissioner or referee under the provisions of Sections 476.450, RSMo 1969 et seq., is one-third of the salary provided for the office of

			probate judge of such county as of July 1, 1971.
425-71	Dec 14	STATE PURCHASING AGENT. SCHOOLS. SCHOOL DISTRICTS.	Junior College districts and other school districts fall under the provisions of House Bill 228, Sections 67.330 through 67.390, RSMo 1969, passed by the Seventy-Fifth General Assembly.
426-71			Withdrawn
427-71	Oct 12		Opinion letter to Mr. Richard M. Miller
433-71	Dec 2		Opinion letter to the Honorable A. Basey Vanlandingham
435-71	Dec 20	COUNTIES. COUNTY COURT. SCHOOL FUNDS. COUNTY TREASURER.	Surplus funds received by the county collector from the sale of property for taxes are to be deposited with the county treasurer as provided for under Section 140.230, RSMo 1969, and invested as provided for under Article IX, Section 7, Constitution of Missouri, 1945 and Section 166.131, RSMo 1969.
441-71	Dec 13		Opinion letter to Mr. Herbert M. Kohn
442-71	Nov 24	LIQUOR. SUNDAY SALES OF PACKAGED LIQUOR BY RESTAURANT BARS.	A license for a "restaurant bar" to sell intoxicating liquor by the drink for consumption on the premises under Section 311.097, S.C.S.S.B. No. 148 of the 76th General Assembly, includes the right to sell intoxicating liquor in the original package.
444-71	Nov 16		Opinion letter to Mr. James E. Schaffner
445-71	Nov 17		Opinion letter to the Honorable Robert A. Young
448-71			Withdrawn
450-71	Nov 10	JURORS. SUMMONS.	A sheriff may serve jury summons by mail under the provisions of Section 494.225, RSMo, (S.C.S.S.B. No. 103 of the 76th General Assembly) effective September 28, 1971, without regard to the method used for assembling and drawing names of jurors.
455-71	Dec 9		Opinion letter to Mr. H. Duane Pemberton
456-71	Dec 17		Opinion letter to Mr. H. Duane Pemberton
457-71	Dec 17		Opinion letter to Mr. H. Duane Pemberton
458-71	Dec 7		Opinion letter to Mr. Joseph Jaeger, Jr.
459-71	Dec 29	TAXATION (INCOME). TAX SHELTERED ANNUITY.	One may deduct from his gross income reportable for Missouri income tax purposes an amount used to purchase a "tax sheltered annuity" pursuant to a deferred compensation agreement with the employer so long as that deduction is not in excess of the amount properly includable in the gross income of the employee pursuant to the provisions of the Internal Revenue Code of the United States.

461-71	Dec 20	COUNTY COURT. COUNTIES. COUNTY COLLECTOR. BONDS.	1. The county court in a third or fourth class county is not required to pay any of the cost of the surety bond for the county collectors. 2. The whole cost of such surety bond must be paid by the county where, (1) the county collector elects to enter into a surety bond with a surety company authorized to do business in the state, and (2) the county court has given its consent to be liable and approves the bond. 3. The county court may not participate in a partial payment of the cost of the surety bond for the county collector.
464-71	Dec 20	CONSTITUTIONAL LAW.	Article XII, Section 3(a), (b) and (c) of the Missouri Constitution provides no method by which a constitutional convention may be limited in its consideration of proposed amendments.
466-71	Dec 20	TAXATION (INTANGIBLE). LABOR UNIONS.	Intangible personal property in which labor unions have a legal, equitable, or beneficial interest is subject to the intangible personal property tax.
471-71	Dec 6		Opinion letter to the Honorable J. F. Patterson
475-71	Dec 22	MERIT SYSTEM. STATE EMPLOYEES. CITIES, TOWNS AND VILLAGES.	A state merit system employee is not prohibited from accepting an appointive position with a city and holding both positions.
476-71	Dec 17		Opinion letter to the Honorable Walter E. Allen
478-71	Dec 15	BONDS. SCHOOLS.	When the voters of a reorganized school district have approved building bonds, such bonds may be issued after subsequent approval by the voters of a reorganization plan which will result in the creation of a new district if the bonds are presented for registration before the board of directors of the new district organizes pursuant to Section 162.301, RSMo 1969.
479-71	Dec 10		Opinion letter to the Honorable W. Clifton Banta, Jr.
481-71			Withdrawn
487-71	Dec 17		Opinion letter to Mr. William Y. McCaskill
489-71	Dec 23		Opinion letter to the Honorable Charles S. Stratton

SCHOOLS:
SCHOOL BUSES:

1. A six-director school district may enter into an agreement whereby a school bus is acquired by monthly

payments so long as the district's obligation thereunder does not exceed income available for the calendar year in which the debt is contracted. 2. The obligation of a school district to return the school bus under the circumstances set forth in the agreement in question would be a "lien" or "encumbrance" under Sections 301.190, 301.600 and 301.620, RSMo 1969, and should be noted on the certificate of ownership. 3. A six-director school district may agree to pay, in addition to monthly payments, insurance premiums for property damage and liability insurance covering the buses except that the district may not use public funds to purchase liability insurance covering its own negligence.

OPINION NO. 3

April 26, 1971

Honorable Harold J. Esser
Representative, District 18
Room 235 A, Capitol Building
Kansas City, Missouri 64114



Dear Representative Esser:

This official opinion is issued in response to your request for a ruling on the following three questions:

"May a school district enter into an agreement whereby a school bus is acquired by monthly lease payments, which agreement does not obligate the district beyond one year, but gives the district the option to purchase the bus at a specified price at the end of the year or to renew the lease for another year, but there is no obligation on the district to exercise either option? This question assumes that the district has the money on hand to make the payments for the one year obligation, but not sufficient funds at inception of the lease to exercise the purchase option.

"May the school district legally take title to such bus subject to a lien in favor of the lessor or subject to an agreement to re-assign title to such bus if the option to purchase is not exercised?

Honorable Harold J. Esser

"May the district agree to provide property damage and liability insurance for such bus, naming the district and the lessor as insureds as their interest may appear?

"This general subject is treated in Opinion No. 359 dated October 29, 1968, but the language of that opinion makes it difficult to tell if it applies to this situation. The Supreme Court case relied on in that opinion dealt with a contract which did obligate the City for more than one year, and for which funds were not on hand."

Question No. 1

The agreement in question is entitled "Lease Purchase Agreement." For the purposes of this opinion, we are not determining whether it is a lease or a conditional purchase agreement. Furthermore, we are accepting and relying on your statement that the agreement did not obligate the school district for more than one school year. We assume your conclusion in this regard is based on the following language in the agreement -- "the length of this lease shall be for a period of not less than the school year of 1968-1969, beginning September 1, 1968."

Article VI, Section 26(a) of the Missouri Constitution states as follows:

"Limitation on indebtedness of local governments without popular vote.--No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

This provision of the Missouri Constitution is self-enforcing and limits the power of a school district to become indebted in an amount exceeding its revenue for the calendar year. Hawkins v. Cox, 334 Mo. 640, 66 S.W.2d 539 (1933); Clarence Special School Dist. v. School Dist. No. 67, 341 Mo. 178, 107 S.W.2d 5, 7 (1937). If a school district incurs a debt as the result of a voluntary contract, the obligation is void if it exceeds the revenue actually provided for that year. Linn Consol. High School Dist. v. Pointer's Creek Public School Dist., 356 Mo. 798, 203 S.W.2d 721, 724 (1947). Section 26(a) does permit the anticipation of current revenues to the

Honorable Harold J. Esser

extent of the income in the year in which the debt is contracted but prohibits anticipation of the revenues of any future year. Ebert v. Jackson County, 70 S.W.2d 918, 920 (Mo. 1934).

Whether Section 26(a) has been violated is determined by the financial condition of the school district at the time a debt is contracted or created. Pullum v. Consolidated School Dist. No. 5, 357 Mo. 858, 211 S.W.2d 30, 34 (1948); Clarence Special School Dist. v. School Dist. No. 67, supra, at 6.

Applying the foregoing principles to the "Lease Purchase Agreement" in question, we have assumed that the school district's obligation thereunder was for one school year which included parts of two calendar years. Assuming that the agreement was entered into in 1968, it was void if the district's obligation under the contract exceeded the income available for calendar year 1968. See, for instance, Ebert v. Jackson County, supra. You state that the school district had on hand sufficient revenues in the year in which the obligation was created to make the payments under the contract. Therefore, we conclude that Section 26(a) of Article VI was not violated in calendar year 1968 because the school district did not have to rely on revenues from any future calendar year to make the payments under this contract even though the term of the contract was for part of two calendar years.

Having concluded that, under the applicable legal principles, the financial condition of the district in 1968 was such that Section 26(a) was not violated, we must now determine whether the board of education of a six-director school district is authorized to enter into an agreement of the kind referred to in your opinion request.

The government and control of a six-director school district is vested in a board of education. See Section 162.261, RSMo 1969. Section 167.231, RSMo 1969, authorizes the board of education to provide free transportation for pupils under certain circumstances. That section states as follows:

"Transportation of pupils within all except metropolitan districts.--Within all school districts except metropolitan districts the school board shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the school board deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to

Honorable Harold J. Esser

and from school at the expense of the district for pupils living more than one-half mile from school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice of the meeting or election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters, who are taxpayers, voting at the election or meeting, are in favor of providing the transportation the board shall arrange and provide therefor."

There is no statutory direction to the board either in Section 167.231 or elsewhere setting forth the manner in which free transportation is to be provided. However, having been granted the authority to provide free transportation under certain circumstances, the power to enter into contracts to carry out this grant is implied. McClure Bros. v. School District, 79 Mo.App. 80, 86 (K.C.Ct.App. 1899). Furthermore, the means and manner of providing free transportation is up to the discretion of the school board. State ex rel. Rice v. Tompkins, 203 S.W.2d 881 (St.L.Ct.App. 1947). Therefore, we believe that entering into an agreement with a company which will provide buses to the district upon the payment of a monthly fee is a reasonable means of obtaining the buses necessary to provide the transportation services authorized by Section 167.231.

Question No. 2

Your second inquiry is whether the school district may legally take title to a bus subject either to a lien in favor of the "lessor" or subject to an agreement to reassign the title to the "seller" if the option to purchase is not exercised.

Section 301.010(21) defines "owner" for the purposes of the registration and licensing of motor vehicles in the State of Missouri as follows:

"'Owner', the term owner shall include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;"

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The agreement that the school district proposes to enter into is, as previously pointed out, either a conditional sale or a lease with the right to purchase upon performance of certain conditions stated in the agreement and with the immediate right of possession vested in the school district. Therefore, for the purposes of the statutes governing motor vehicle registration and licensing we conclude that the school district would be an "owner" of the vehicle as that term is defined in Section 301.010(21).

The second paragraph of Section 301.260, RSMo 1969, provides as follows:

" . . . and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of sections 301.010 to 301.440 requiring registration, proof of ownership and display of number plates; . . . Provided, further, that when any motor vehicle is owned and operated exclusively by any school district and used solely for transportation of school children, the commissioner shall assign to each of such motor vehicles two plates bearing the words 'School Bus, State of Missouri, car no.' (with the number inserted thereon), which plates shall be displayed on such motor vehicles when they are being used on the highways. . . ."
[Emphasis supplied]

If a school district is an "owner" of a motor vehicle for the purposes of the motor vehicle licensing and registration laws of Missouri, it is only reasonable to conclude that the school district "owns" that vehicle for the purposes of those laws. See Opinion No. 444, dated December 14, 1965, to Honorable J. R. Fritz (copy enclosed).

Therefore, pursuant to the quoted portions of Section 301.260 any school bus owned by a school district and operated exclusively for transportation of school children is (1) exempt from the provisions of Sections 301.010 to 301.440 requiring registration, proof of ownership and display of number plates and (2) shall be assigned two special license plates. We are advised by the Department of Revenue that, pursuant to Section 301.260, a certificate of ownership will be issued to any school district upon the payment of one dollar.

May the obligation of the school district to return the buses to the company be indicated on the certificate of ownership?

Honorable Harold J. Esser

Pursuant to paragraph 1 of Section 301.190, RSMo 1969, an application for certificate of ownership must include ". . . any liens or encumbrances on the motor vehicle. . . ." Paragraph 2 of that section states that the certificate of ownership shall contain, among other things, ". . . a statement of any liens or encumbrances which the application may show to be thereon." See, also, Sections 301.600 through 301.660, RSMo 1969. Although no definition of "lien" or "encumbrance" is set forth in Chapter 301, Section 301.620 requires that an "owner" of a motor vehicle show on his application for certificate of ownership, among other things, ". . . the name and address of the lienholder and the date of his security agreement," A "security agreement" is defined in Section 400.9-105(1)(h), RSMo 1969, as ". . . an agreement which creates or provides for a security interest;". The definition of "security interest" is found in Section 400.1-201(37):

"'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 400.2-401) is limited in effect to a reservation of a 'security interest'. The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under section 400.2-401 is not a 'security interest', but a buyer may also acquire a 'security interest' by complying with article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a 'security interest' but a consignment is in any event subject to the provisions on consignment sales (section 400.2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security; and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

Honorable Harold J. Esser

Regardless of whether the agreement between this district and the company is a conditional sale or lease agreement, the obligation of the district to return the buses to the company under certain circumstances was designed to secure "payment or performance" of the district's obligation. Therefore, we conclude that it would be a "lien," "encumbrance" or "security interest" and should be noted on the certificate of ownership. Sections 301.190, 301.600, and 301.620.

Question No. 3

Your third question involves the propriety of a school district agreeing to provide property damage and liability insurance for these buses naming the district and the "company" as insureds as their interest may appear.

The agreement in question provided that the school district should furnish certain described insurance.

"INSURANCE:

The leasee shall furnish insurance according to the following provisions.

(A) Loss payable clause to DIVCO-WAYNE Sales Financial Corporation. (B) The loss payable clause shall cover fire, theft, and collision in the amount of \$200.00 deductible. (C) The loss payable clause must provide a 10-day notice of cancellation to the lessor. (D) A minimum of \$100,000. public liability insurance naming the leasee, the lessor, and Divco-Wayne Sales Financial Corporation as the insured."

We assume for the purposes of this opinion that the school board could and did determine the cost of the required insurance coverage before executing the agreement.

Under these circumstances, we believe that the agreement may contain a provision that insurance premium payments are to be made by the school district in addition to a monthly payment. Pursuant to the agreement, the liability for damage to the buses rests with the school district. For the school district to insure its obligation in this regard would be within its power. Similarly, the school board could, as part of the consideration for this agreement, agree to pay the premium on a liability insurance policy naming the "lessor" as the insured. However, the board could not expend public funds to purchase liability insurance covering its own negligence for the reasons stated in Opinion No. 93, September 9, 1969, to Honorable William J. Cason (copy enclosed).

Honorable Harold J. Esser

CONCLUSION

Therefore, it is the conclusion of this office that:

1. A six-director school district may enter into an agreement whereby a school bus is acquired by monthly payments so long as the district's obligation thereunder does not exceed income available for the calendar year in which the debt is contracted.

2. The obligation of a school district to return the school bus under the circumstances set forth in the agreement in question would be a "lien" or "encumbrance" under Sections 301.190, 301.600 and 301.620, RSMo 1969, and should be noted on the certificate of ownership.

3. A six-director school district may agree to pay, in addition to monthly payments, insurance premiums for property damage and liability insurance covering the buses except that the district may not use public funds to purchase liability insurance covering its own negligence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

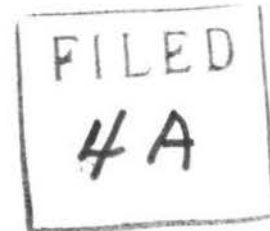
Enclosures: Op. No. 444
12-14-65, Fritz

Op. No. 93
9-9-69, Cason

Answer by letter-Wood

February 22, 1971

OPINION LETTER NO. 4A



Honorable Joe D. Holt
Representative, District 102
Room 405, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Holt:

You have asked for our opinion on who is the proper "governing body" to adopt, modify or reject the written results of labor discussions arising out of proposals tendered by Local 1810, American Federation of State, County and Municipal Employees, AFL-CIO, in behalf of employees of the Ellis Fischel State Cancer Hospital pursuant to the Public Employee Labor Organization Law (Section 105.500, et seq., RSMo).

The State Cancer Commission is charged by law with the responsibility for making all rules and regulations for the conduct and discipline of the State Cancer Hospital, selecting and appointing the general medical staff of the hospital, and appointing an administrator for the hospital (Sections 200.020-200.040, RSMo). The administrator is in charge of the operation and conduct of the hospital and he is to employ nurses, attendants and other employees necessary to the administration of the hospital (Sections 200.020 and 200.050, RSMo).

The Cancer Commission has been assigned to the Division of Health in the Department of Public Health and Welfare (Section 192.010, RSMo). The State Board of Health has succeeded to all "statutory responsibilities of the Division of Health other than those of an administrative nature" (Section 191.410, RSMo). The Department of Public Health and Welfare, established pursuant to constitutional mandate (Article IV, Section 37, Constitution of Missouri, 1945) is composed of the Divisions of Health, Welfare and Mental Health (Section 191.010, RSMo). The department is controlled and administered by the director of the Department of Public Health and Welfare (Section 191.020, RSMo). The director of

Honorable Joe D. Holt

each of the three divisions within the department is, subject to the supervision of the director of the department, the chief administrative officer of his division, and each division director may appoint and discharge the employees of his division subject to the approval of the director of the department (Section 191.060, RSMo).

Does the director of the Department of Public Health and Welfare or the director of the Division of Health have control and authority over the State Cancer Hospital? We think so. The law (Section 192.010, RSMo) assigning the Cancer Commission to the Division of Health in the Department of Public Health and Welfare is in apparent obedience to the constitutional direction that there shall be no more than sixteen departments within the executive branch of state government, to which all boards, bureaus, commissions and other agencies exercising administrative or executive authority shall be assigned (Article IV, Section 12, Constitution of Missouri, 1945).

For reasons set forth in our Opinion No. 57 of March 10, 1948, to Samuel Marsh (copy attached), we perceive a legislative intention from the above statutes that the Cancer Commission and the administrator of the State Cancer Hospital shall be subject to the control and direction of the Department of Public Health and Welfare and the Division of Health in their operation of the Cancer Hospital.

While the director of the Department of Public Health and Welfare does have supervisory control over the divisions within the department, we believe he exercises such control in his discretion, and that in the absence of his exercising his right to take part in labor discussions and adopting, modifying or rejecting the written results of such discussions, the directors of the respective divisions properly participate in the labor discussions and properly adopt, modify or reject the written results. We believe the department director is a proper party and one who has a right to participate in labor discussions and subsequent understandings but that he is not a necessary party to the discussions and understandings.

Any presently existing understandings adopted by the directors of the respective divisions are valid and subsisting understandings even though not adopted by the director of the Department of Public Health and Welfare. Of course, the director of the Department of Public Health and Welfare may at any time specifically disapprove any understandings.

Accordingly, it is our opinion that future labor proposals submitted pursuant to Sections 105.510 and 105.520, RSMo, in behalf of employees of the Ellis Fischel State Cancer Hospital

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are properly presented to the director of the Division of Health for discussion and ultimate adoption, modification or rejection, and that past labor proposals presented to, and adopted by the director of the Division of Health are valid until expressly disapproved by the director of the Department of Public Health and Welfare.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 57
3-10-48, Marsh

TAXATION:

A person who holds an unassigned certificate of purchase from a tax sale made in 1963 does not have a lien on the real estate described in the certificate, if such real estate is again sold for delinquent taxes in 1970 or subsequent years.

OPINION NO. 5

January 12, 1971

Honorable O. L. Wallis
State Representative
District No. 152
1331 Pershing
Poplar Bluff, Missouri 63901



Dear Representative Wallis:

This is in response to your request for an official opinion on the question whether a person who holds an unassigned certificate of purchase from a tax sale purchaser in 1963 has a lien on the real estate described in the certificate if such real estate is again sold for taxes in 1970.

Section 140.280, RSMo 1969, provides that when real estate is sold for taxes, ". . . the purchaser at such sale shall immediately pay the amount of his bid to the collector," Section 140.290 (1) provides that, "After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase," Section 140.290 (3) is as follows:

"Such certificate shall be assignable, but no assignment thereof shall be valid unless endorsed on such certificate and acknowledged before some officer authorized to take acknowledgment of deeds and an entry of such assignment entered in the record of said certificate of purchase in the office of the county collector."

In State ex rel. City of St. Louis v. Bauman, 153 S.W.2d 31, 34 (Mo. en banc 1941) the court held that a certificate of purchase ". . . alone did not pass title for the obvious reason title to land sold for taxes under the law of this State remains in the owner during the period of redemption. . . ." It is the duty of the purchaser or his assignee to secure a deed from the county collector at the expiration of two years from the date of sale. Section 140.420(1), RSMo 1969, provides:

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"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold."

Section 140.410, RSMo 1969, provides it is the duty of the purchaser or his assignee to have the deed placed on record in the proper county within four years from the date of sale as follows:

"In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs and a certificate of purchase has been or may hereafter be issued it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale; provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided."

In *Journey v. Miler*, 250 S.W.2d 164, 165 the court quoted Section 140.410 and explained its purpose as follows:

". . . The apparent purpose of this statute is to require the holder of a certificate of purchase to obtain a deed within the specified period or lose his right to either a deed or reimbursement and thus settle the title, which otherwise remains indefinite during that period. See *State ex rel. and to Use of Baumann v. Marburger*, 353 Mo. 187, 182 S.W.2d 163."

Honorable O. L. Wallis

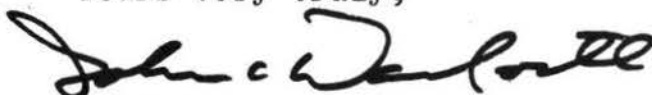
It appears, therefore, that the holder of the certificate of purchase, having failed to obtain an assignment of the certificate and having failed to obtain a deed within the specified period has no lien on the real estate described in the certificate. Please find enclosed a copy of an opinion dated March 8, 1940, issued by this office to Mr. W. A. Holloway holding that the failure of a certificate holder to have executed and recorded a deed within four years from the date of sale, causes the amount due such purchaser to cease to be a lien on the lands and lots for the particular years involved.

CONCLUSION

It is the opinion of this office that a person who holds an unassigned certificate of purchase from a tax sale made in 1963 does not have a lien on the real estate described in the certificate, if such real estate is again sold for delinquent taxes in 1970 or subsequent years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 41
3-8-40, Holloway

May 10, 1971

Answered by Letter - Jones
OPINION LETTER NO. 6



Honorable Corley Thompson, Jr.
State Representative
Forty-first District
Room 202-D Capitol Building
Jefferson City, Missouri 65101

Dear Representative Thompson:

This letter is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"If two different organizations both able to make contributions to the Public Retirement System to the State of Missouri share an employee between them, can both organizations agree to put their proportionate share into the Public Retirement System for that teacher?

* * *

"May a teacher employed by a professional association during a school year while on leave from teaching in that district be an active participant in the Public Retirement System?"

In rendering an opinion on this matter, "the public retirement system" has been assumed to be the Public School Retirement System of Missouri as provided for by Sections 169.010 through 169.130, RSMo 1969. It is also our understanding that the "two organizations" referred to in your first question are a school

Honorable Corley Thompson, Jr.

district and a local teachers' association which is affiliated with the Missouri State Teachers' Association, a statewide non-profit educational association.

In response to your request, the word "teacher" is defined in part in subsection 16 of Section 169.010, RSMo 1969, as follows:

"'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; . . ." (Emphasis ours).

In addition, the word "employer" is defined in subsection 7 of Section 169.010, RSMo 1969, as follows:

"'Employer' shall mean the district that makes payment directly to the teacher or employee for his services; . . ."

It should also be noted that subsection 2 of Section 169.130, RSMo 1969, reads as follows:

"Any person, duly certificated under the law governing the certification of teachers, employed full time by any statewide nonprofit educational association or organization serving on an educational professional basis through its membership the active members of the public school retirement system of Missouri or the public school districts maintaining high schools in this state, may be a member of the public school retirement system of Missouri. Any such person who becomes a member before July 1, 1955, may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid by the association or organization."

As a result of the above statutory provisions, it is our view in response to your first question that a teacher has to be employed by one employer and that he or she has to be employed by

Honorable Corley Thompson, Jr.

that employer on a full time basis in order to be eligible for membership in the Public School Retirement System of Missouri.

In regard to your next question, the assumption is made that the "professional association" refers to a statewide non-profit educational association or organization and that the individual would be employed full time and receive full salary from the association. Under these circumstances, it is our view that if an individual is duly certificated under the law governing the certification of teachers, and is employed full time by a statewide nonprofit educational association or organization as set forth in subsection 2 of Section 169.130, RSMo 1969, then the individual is eligible to be an active participant in the retirement system; provided that, the contributions required to be made by the individual's employer shall be paid by the association or organization as set forth in subsection 2 of Section 169.130, RSMo 1969, to the retirement system, while the individual is on leave from teaching.

Very truly yours,

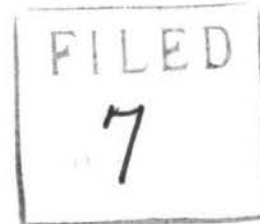
JOHN C. DANFORTH
Attorney General

Answer by letter-Jones

January 27, 1971

OPINION LETTER NO. 7

Honorable J. H. Frappier
Representative, District 24
Room 202J, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Frappier:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to whether or not the manager of the St. Louis Suburban Teachers Association Credit Union who is certified to teach in the State of Missouri, but is presently not teaching in a school system, is eligible to become a member of the Public School Retirement System of Missouri. It is our understanding that the Teachers Credit Union services all school employees in a four county area.

In response to your request, it should first of all be noted that the individual described does not qualify as a "teacher" as defined in subsection 16 of Section 169.010, RSMo 1969. Furthermore, subsection 2 of Section 169.130, RSMo 1969, reads as follows:

"Any person, duly certificated under the law governing the certification of teachers, employed full-time by any statewide nonprofit educational association or organization serving on an educational professional basis through its membership the active members of the public school retirement system of Missouri or the public school districts maintaining high schools in this state, may be a member of the public school retirement system of Missouri. Any such person who becomes a member before July 1, 1955, may claim and receive credit for prior service. The contributions required to be made by the member's employer shall be paid by the association or organization."

Honorable J. H. Frappier

The phrase "statewide nonprofit educational association or organization" is not defined in Chapter 169. It should be noted, however, that a credit union, while not ordinarily a private corporation for profit, is organized under specific statutory provisions with its membership limited to certain well-defined groups of people, such as those living within a certain district, employees of a common employer, or the like. In addition, a credit union is generally restricted in making loans to its membership. See 13 Am.Jur.2d, Building and Loan Associations, Section 4, page 146.

Therefore, without passing on whether a credit union is a nonprofit educational association or organization, it is our view that a Teachers Credit Union, which only provides services for school employees in a four county area, does not meet the statutory requirement of being "statewide" and that the manager of the credit union is not eligible for membership in the Public School Retirement System of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 16, 1971

OPINION LETTER NO. 9
Answer by Letter (Bartlett)

Mr. William F. Moore
4320 Bell
Kansas City, Missouri 64111



Dear Mr. Moore:

This letter is issued in response to your request for a ruling on the following question:

"I would like to request an opinion from your office on the legality of public funds, Federal and State, supporting the bussing of private or parochial school students under any circumstance."

With reference to the use of federal funds for supporting the bussing of private or parochial school students in Missouri, you furnish us no factual situation upon which we can rule, nor do you refer us to any specific federal program providing such funds in Missouri. We are reluctant to hypothesize facts upon which to base an opinion in this area. Therefore, we decline to rule on what the result would be under the Missouri Constitution if there were a federal plan authorizing moneys to be spent in this manner.

With reference to the expenditure of state funds to support the bussing of private or parochial school students, the Missouri Supreme Court in McVey, et al v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953) considered Missouri statutes then in effect which appeared to authorize the expenditure of public school moneys to defray the expense of transporting private school children to and from school. The Court concluded that such a use of public school moneys was not "for establishing and maintaining free public schools" as required by the Constitution:

". . . if the use of the fund or any part thereof is not within the purpose for which it was dedicated and appropriated, the use must be enjoined and the transportation discontinued." Id. at 932.

Honorable William F. Moore

Later, the Court stated:

" . . . We must and do hold that the public school funds used to transport the pupils part way to and from the St. Dennis Catholic School at Benton are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful. It necessarily follows that such transportation of said students at the expense of the district is unlawful and must be enjoined" Id. at 933-934.

Although the Court in the McVey case did not at any time use the term "unconstitutional", it did, by the language above quoted, directly hold that certain provisos of two Missouri statutes then in effect were in conflict with constitutional provisions. Therefore, the Court in effect held those provisos unconstitutional.

For a detailed analysis of the McVey decision we are enclosing herewith a copy of Opinion No. 96, dated August 25, 1953, to the Honorable Hubert Wheeler. In addition to the analysis of the McVey decision, the second question in this opinion is whether a board of education would have any legal basis for aiding private school transportation, assuming that the statutory provisions then in effect were nullified by the McVey decision. The opinion concluded as follows with respect to this question:

"Therefore, in order to justify the expenditure of public funds for aiding private school transportation, boards of education must be able to point to some legislative enactment consonant with the provisions of the Constitution which authorize such expenditure. Since the only statutory provisions purporting to authorize the payment of public funds for this purpose have been held in violation of the Constitution, and consequently null and void, there is no legal basis for boards of education to provide assistance from public funds for transportation of pupils to private schools whether they be elementary or high schools."

This office is aware of no language in any statute presently in effect in the State of Missouri which would authorize the expenditure of public funds for aiding private school transportation.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: No. 96, August 25, 1953, Wheeler.

May 12, 1971

Answer by letter-Wood

OPINION LETTER NO. 10



Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
P. O. Box 176
Jefferson City, Missouri 65101

Honorable Hardin C. Cox
State Representative
District No. 78
State Capitol Building
Jefferson City, Missouri 65101

Gentlemen:

Mr. Jaeger has inquired if the Missouri State Park Board may legally loan a dredge and related equipment, procured by the Board with appropriated funds, to a political subdivision or non-profit organization for dredging ox-bow lakes in Missouri. The particular appropriation used by the Board to obtain the equipment was as follows:

"To the State Park Board

"For the purpose of removing mud from the
lake at Big Lake State Park, Holt County,
Missouri.

"From General Revenue. . . . \$110,000.00"
(Section 75, House Bill No. 15, 73rd General
Assembly, L. 1965, p. 75; for the period end-
ing June 30, 1966)

The Park Board is generally authorized to hold "lands, sites, objects or facilities" which are purchased, condemned, leased or donated for state park purposes, and to ". . . improve, maintain,

Mr. Joseph Jaeger, Jr.
Honorable Hardin C. Cox

operate and regulate . . . such lands, sites, objects or facilities . . . [to] promote the park program . . ." (Section 253.040, RSMo).

In our Opinion No. 420 to Mr. Jaeger on October 28, 1969 (copy enclosed), we stated the view that this statute only permits the Park Board to expend public monies on lands owned or leased by the State of Missouri for park purposes. Assuming that the State of Missouri does have title to Big Lake, we believe use of the dredge thereon is proper. However, for the same reasons expressed in Opinion No. 420, we believe that use of the dredge on a lake not owned by the State of Missouri would be improper.

Representative Cox has raised the following separate but related questions:

In view of the specific appropriation in 1965 for dredging Big Lake, may the Park Board without additional legislation move the dredge procured through this appropriation.

If the legislature each year since 1965 makes "line item" appropriations to the Park Board for the specific purpose of dredging the lake in Big Lake State Park, and if in 1970 the legislature makes a blanket reduction in the Park Board's total budget, does the Park Board have the right to entirely discontinue the dredging operation at Big Lake State Park, or must the Park Board only reduce the dredging operation proportionate to the overall budget reduction?

We interpret Representative Cox's first question to ask if the dredge at Big Lake State Park can be moved to a different state park in the discretion of the Park Board for the purpose of dredging another state owned lake therein. Under the rule that an appropriation measure may not amend a substantive statute (Article III, Section 23, Constitution of Missouri, 1945; *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 790 (Mo. banc 1938)), we do not believe that Section 75, House Bill No. 15, *supra*, can either broaden or restrict the general powers conferred upon the Missouri State Board by Section 253.040, RSMo, and we are accordingly of the opinion that the Park Board may utilize property procured through the appropriation within the general purposes expressed in Section 253.040, RSMo. Therefore, we believe that the Park Board may move the dredge and related equipment to a different state park for use on an oxbow lake owned or leased by the State of Missouri and held by the Board for state park purposes.

Mr. Joseph Jaeger, Jr.
Honorable Hardin C. Cox

With regard to the second question of Representative Cox, our examination of the appropriation laws from 1965 to the present reveals that Section 75, House Bill No. 15, 73rd General Assembly (L. 1965, p. 75) is the only specific appropriation to the Park Board for dredging at Big Lake State Park. In view of this fact, it appears that the question is moot.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 420
10-28-69, Jaeger

OFFICERS:
INSURANCE:
COUNTY OFFICERS:

County court may pay premiums on group insurance policy covering county officers and employees whose salaries are set by county court or other county officers or circuit judge.

OPINION NO. 11

April 6, 1971

Op. No. 140-1976 should always be sent with this
opinion.
Honorable Fred E. Copeland
State Representative
District No. 159
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Copeland:

This letter is in response to your request for an opinion of this office in which you ask:

"Can a county court purchase group hospital insurance for its nonelected employees such as road employees, deputy clerks, etc. as a form of compensation consistent with opinion 93 Cason 1969?"

We consider this a request which asks if the nonelected employees of New Madrid County may have paid for them, as a part of their compensation, the premium on a group hospital insurance program.

Initially, a discussion should involve the county court. A search of the Missouri statutes reveals no express authority which authorizes a third class county to employ individuals to assist the county court in carrying out its express powers. It would appear, however, that the Supreme Court of Missouri has addressed itself to this problem in the case of *Aslin v. Stoddard County* (Mo.Sup. 1937) 106 S.W.2d 472, where the court states at page 475:

"By section 2078, R.S.1929, Mo.St.Ann. § 2078, p. 2658, [now Section 49.270, RSMo 1969] it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express

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power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body.

. . . "

Thus, it would appear that the language of the court clearly authorizes third class county courts to employ individuals whose labor and service are reasonably necessary in order that the county court may carry out the express powers granted to it by statute. Thus, having determined that the county court of a third class county may employ those individuals reasonably necessary to effectuate the express powers granted to the county court, the question becomes one of whether the county court must limit the form of compensation to be paid such employees to legal tender, or whether the county court may compensate its employees by a combination of legal tender, and the payment of the premium of a group hospitalization insurance policy.

Reference should be had to Opinion of the Attorney General No. 93, Cason, 9-9-69, from which it can be seen that this office has held that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee. In light of the fact that there is no statutory prohibition as to the purchase of group hospitalization insurance on employees which the county court may hire and compensate, it is the conclusion of this office that as to those employees which the county court may hire and compensate, the county court may in its discretion pay the premium on a hospitalization insurance policy as a part of said employees' compensation.

Consistent with Section 51.450, RSMo 1969, the county clerk in third class counties is entitled to employ deputies and assistants and determine the compensation to be paid said deputies and assistants. It would appear to be a matter of discretion, under paragraph 1 of Section 51.450, with the county clerk as to the number of deputies and assistants that he may need at a given time and the compensation that is to be paid them:

"1. The clerk of the county court in each county of the third class is entitled to employ deputies and assistants, and for the deputies and assistants, is allowed the following sums:

* * *

Honorable Fred E. Coneland

"(4) In counties having a population of twenty thousand, and less than twenty-four thousand, the sum of seventy-five percent of the salary of the county clerk;

* * *

"2. The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed one thousand dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of the county; but the county court shall determine that the work required to be done by the clerks demands or requires the extra remuneration.

"3. In addition to salaries fixed by this section the deputy county clerk shall receive one thousand dollars a year payable out of the county treasury."

This office has previously held in Opinion of the Attorney General No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, thus, it would appear, that those employees hired by the county clerk consistent with Section 51.450[1] (4) may have a part of their compensation paid to them in the form of a premium on a hospitalization insurance policy.

A full reading of Section 51.450[1] (4) indicates that initial discretion as to the payment of a premium on a group hospitalization insurance policy covering the deputies and assistants of the clerk of the county court, resides with the clerk of the county court. If, in the first instance, the clerk of the county court authorizes the payment of a premium on a hospitalization insurance policy for his deputies and assistants, and secondarily the county court agrees that the deputies and assistants of the county clerk may participate in a group policy covering all employees over which the county court has authority, the deputies and assistants of the county clerk may participate in any group hospitalization insurance policy purchased by the county court on payment of the requisite premiums.

As to the sum authorized consistent with Section 51.450[2], as additional compensation to any regular deputy, the county court

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has the discretion to determine if part of this sum may be used toward the payment of a premium on a group hospitalization insurance policy.

As to the sum authorized to be paid to the deputy clerk consistent with Section 51.450[3], as additional compensation to the foregoing sections, the intent would appear to be clear that this section is restrictive in its content in that this section authorizes the payment of one thousand dollars a year in specie from the county treasury to the deputy county clerk, and does not authorize compensation to be paid in any other form.

Consistent with Section 483.345, RSMo 1969, the circuit clerk of a third class county is given the authority to appoint deputies and assistants with the approval of the judge of the circuit court, with the judge of the circuit court fixing the compensation of such deputies or assistants by court order:

"Every circuit clerk in counties of the third and fourth classes shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may, at any time, discharge any deputy or assistant and may regulate the time of his or her employment, and the circuit court may at any time modify or rescind its order permitting an appointment to be made."

As can be seen from the foregoing section, both the amount and form of the compensation to be paid deputies and assistants of circuit clerks is to be set in the discretion of the judge of the circuit court. In light of the fact that this office has held, in Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, it is the conclusion of this office that consistent with Section 483.345, the judge of the circuit court has the discretion to order the payment of a premium on hospitalization

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insurance as a form of compensation to the deputies and assistants appointed thereunder. Additionally, it would appear that on authorization of the circuit judge, and approval by the county court, those employees appointed under Section 483.345, may participate in any group hospitalization insurance program authorized by the county court.

Consistent with Section 59.257, RSMo 1969, the recorder of deeds in a third class county, where there is a separate circuit clerk and recorder, is given the authority to appoint deputies, and set their salaries, with the approval of the county court:

"The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, is entitled to appoint the deputies that the recorder of deeds, with the approval of the county court, deems necessary for the prompt and proper discharge of the duties of his office. The deputies shall possess the qualifications of clerks of courts of record and may, in the name of their principal, perform the duties of the recorder of deeds, but all recorders of deeds and their sureties are responsible for the official conduct of their deputies. The deputies appointed as herein provided shall receive the salaries that are fixed by the recorder of deeds, with the approval of the county court, from the general revenue of the county. The appointment of every deputy shall be in writing, endorsed with an oath of office similar to that taken by the recorder of deeds and subscribed to by the deputy appointed, and filed by the recorder with the county court."

As can be seen by a full reading of the section cited above, the recorder of deeds in the first instance determines the salaries of his deputies, with the approval of the county court. In light of the fact that this office has held, in Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, as to those deputy recorders hired pursuant to Section 59.257, the recorder may authorize the payment of a premium on a hospitalization insurance policy as a form of compensation, and if this authorization is approved by the county court, the court may pay as a form of compensation, the premium on a group hospitalization insurance policy.

Consistent with Section 56.245, RSMo 1969, the prosecuting attorney of a third class county is given the authority to hire

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such stenographic and clerical help as is necessary, and to set their salaries, on the approval of the county court, not to exceed four thousand dollars per year per employee:

"The prosecuting attorney in counties of the third and fourth class may employ such stenographic and clerical help as may be necessary for the efficient operation of his office. The salary of any stenographer or clerk so employed shall be fixed by the prosecuting attorney with the approval of the county court to be paid by the county but such salary shall not exceed four thousand dollars per year in third class counties and one thousand eight hundred dollars per year in fourth class counties."

As can be seen from the foregoing section, the salary to be paid a specific employee under Section 56.245 may not exceed a set statutory maximum. In light of the fact that the salaries to be paid under Section 56.245 are open-ended to the extent that they may not exceed a maximum, we believe that within the maximum authorized, an employee may be compensated both in specie, and in the form of payment of a premium on an insurance policy, so long as the cumulative value of compensation does not exceed the statutory maximum.

Thus, it is our conclusion that the prosecuting attorney may, in the exercise of his discretion, authorize the payment of a premium on a hospitalization insurance policy as a form of compensation for his stenographic and clerical help, and if this authorization is approved by the county court, the stenographic and clerical help authorized under Section 56.245, may have the premium of a hospitalization insurance policy paid for them as a form of compensation.

By Section 56.240, RSMo 1969, the prosecuting attorney of a third class county is authorized to appoint one assistant prosecuting attorney. It would appear that the compensation to be paid to that assistant prosecuting attorney shall be paid by the prosecuting attorney, except there may be paid out of the county treasury, in the discretion of the county court, a sum not to exceed three thousand six hundred dollars a year in a third class county which has a population of over thirty thousand:

"The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities

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and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are liable. The appointment of the assistant prosecuting attorney shall be made in writing and filed by the prosecuting attorney, and such assistant prosecuting attorney shall take and subscribe to the oath or affirmation of office required of prosecuting attorneys, which appointment and oath or affirmation of office shall be filed in the office of the clerk of the circuit court of the county. The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the discharge of the duties of his office so that he cannot attend. In counties of the third class the assistant prosecuting attorney shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney, but the former shall be disqualified from defending in any criminal case. The compensation of an assistant prosecuting attorney in third class counties shall be paid by the prosecuting attorney; except that, with the approval of the county court in a county of the third class which contains more than thirty thousand inhabitants or in a county of the third class which contains part of a city of at least three hundred thousand inhabitants, an assistant may be paid out of the county treasury an annual salary not to exceed three thousand six hundred dollars. In counties of the fourth class the assistant prosecuting attorney shall be paid only by the prosecuting attorney and may assist the prosecuting attorney at his request in any case and the former shall not be disqualified from defending in any case, civil or criminal, except those in which he has acted as assistant prosecuting attorney." [emphasis added]

As can be seen from a full reading of Section 56.240, compensation authorized to be paid out of the county treasury for an assistant prosecuting attorney may not exceed a statutory maximum of three thousand six hundred dollars per year. As we have previously held, where a specific statutory maximum in dollars is set by a statute, it is our conclusion that compensation may take the form

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of both payment in specie, and the payment of a premium on an insurance policy, with the cumulative value of both specie and premium payment, not to exceed the statutory maximum. Thus, we conclude that the county court may authorize the payment of the premium on a hospitalization insurance policy as a form of compensation for the assistant prosecuting attorney, which the court has elected to compensate, appointed consistent with Section 56.240.

We note, however, that the last decennial census reports that New Madrid County has a population of 23,420, and thus it is our conclusion that the compensation for the assistant prosecuting attorney of New Madrid County shall be paid by the prosecuting attorney.

The sheriff of a third class county is given the authority to appoint those necessary deputies and assistants, with such appointments being made on the approval of the judge of the circuit court. Additionally, the judge of the circuit court is given the authority, by court order, to fix the compensation of said deputies and assistants consistent with Section 57.250, RSMo 1969, which states, in pertinent part:

"The sheriff in counties of the third and fourth classes shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. . . ."

Thus, in light of the fact that we have held, in Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, it is the conclusion of this office that consistent with Section 57.250, the judge of the circuit court may in his discretion authorize by court order, the payment of a hospitalization insurance policy as a part of the compensation of deputies provided for under this section.

Additionally, it is our further conclusion, that with the approval of the county court, those deputies and assistants within Section 57.250, authorized by the circuit judge to receive as a form of their compensation the payment of a premium on a group hospitalization insurance policy, may participate in any policy authorized by the county court for the employees under its authority to compensate.

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A county collector of a third class county is given authority to appoint deputies consistent with Section 52.300, RSMo 1969, which reads in pertinent part:

"Collectors may appoint deputies, by an instrument in writing, duly signed, and may also revoke any such appointment at their pleasure, and may require bonds or other securities from such deputies to secure themselves; . . ."

Further, by Section 52.280, RSMo 1969, a county collector of a third class county is authorized to retain fees for the payment of deputy and clerical hire:

"In addition to the maximum amount of fees and commissions permitted to be retained by county collectors in sections 52.260 and 52.270, each collector in counties of the third and fourth classes may retain for the payment of deputy and clerical hire a sum not to exceed seventy percent of the maximum amount of fees and commissions which the officer is permitted to retain by the sections, but the deputy and clerical hire is payable out of fees and commissions earned and collected by the officer only, and not from general revenue."

As can be seen from the foregoing section, the county collector is authorized to compensate deputy and clerical hire from a sum not to exceed seventy percent of the maximum amount of fees and commissions which the collector is himself permitted to retain. In light of the fact that the form of compensation is not limited, it is our conclusion that since we have held, in Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, the county collector of a third class county, not a township county, may in his discretion pay as a form of compensation, the premium on a hospitalization insurance policy for those deputies and clerical assistants authorized consistent with Section 52.280. Additionally, it is our further conclusion that on the approval of the county court, the employees hired consistent with Section 52.280, who have had authorized for them by the county collector, the payment of a premium on a hospitalization insurance policy as a form of compensation, may participate in any group hospitalization program authorized by the county court for the employees for which it is authorized to compensate.

A county assessor of a third class county is given authority to appoint and fix the compensation of such clerical or stenographic

Honorable Fred E. Copeland

assistants as may be necessary, with the setting of the compensation of such assistants to be subject to the approval of the county court by Section 53.095, RSMo 1969, which states:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of the clerical or stenographic assistants shall be paid from the county treasury subject to the approval of the county court, and shall not exceed twelve hundred dollars per annum in counties of class three and six hundred dollars per annum in counties of class four."

As can be seen from the foregoing section, the only qualification as to compensation of clerical or stenographic assistants of a county assessor is that the total payment for all employees cannot exceed twelve hundred dollars per year in third class counties. As we have previously held, where a statute sets a maximum within which an employee may be compensated, it is our conclusion that the compensation which may be paid that employee may consist of both specie and the payment of the premium on an insurance policy. Thus, it would appear that consistent with Section 53.095, the assessor may in his discretion, and with the approval of the county court, authorize payment of the premium on a group hospitalization insurance policy for those employees appointed consistent with Section 53.095. Additionally, the assessor of a third class county is given the authority to appoint a deputy assessor consistent with Section 53.060, RSMo 1969, which states:

"Each deputy assessor shall take the same oath and have the same power and authority as the assessor himself. The assessor is responsible for the official acts of his deputies."

It would appear, however, after a review of the statutes relating to assessors and their deputies in counties of the third class that no provision exists for the payment of compensation to such deputies. This office has by former Opinion No. 17, Clemens, 2-4-50, held that counties of the third class may not compensate deputy assessors in light of the fact that no specific provisions of law provide for said deputy assessors' compensation. The conclusion in that opinion was necessitated by the case of *Alexander v. Stoddard County* (Mo.Sup. 1948) 210 S.W.2d 107 in which the court stated at page 109:

Honorable Fred E. Copeland

"In any event the legislature has the power to fix and limit the salaries of deputies and 'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. . . .'" [emphasis added]

Thus, it would appear that the employment and compensation of a deputy assessor of a third class county is one of private contract.

Consistent with Section 54.010, RSMo 1969, the office of county treasurer is created in all counties of the state. There are, however, no constitutional or statutory provisions for the appointment of clerk and stenographic hire, or the appointment of deputy county treasurers in a third class county. By former Opinion of this office, however, No. 40, Hill, 3-13-50, in reliance upon *Bradford v. Phelps County* (Mo.Sup. 1948) 210 S.W.2d 996, it was held that the county court of a third class county, not under township organization, could pay stenographic help for a county treasurer. Inasmuch as there is no statutory prohibition as to the form that compensation may take as to a stenographer employed by the county treasurer, it is the conclusion of this office that in light of the fact that we have held, in Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, the county court may in its discretion, as a form of compensation, pay the premium on a hospitalization insurance policy for the clerical or stenographic assistant of the county treasurer of a third class county.

The office of coroner is established in every county of the state consistent with Section 58.010, RSMo 1969, but it would appear, after a review of the statutes relating to coroners, that no provisions exists for the appointment, nor compensation of deputies or assistants to the coroner in counties of the third class.

Consistent with Section 61.160, RSMo 1969, the county court of a third class county is authorized to appoint a highway engineer, and the county court is further authorized consistent with Section 61.190(2), RSMo 1969, to pay the county highway engineer an annual salary not to exceed six thousand dollars per year:

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"2. In all counties of the third and fourth class the county highway engineer shall receive an annual salary, to be fixed by the county court, of not to exceed six thousand dollars per year in counties of class three, . . ."

Additionally, the county engineer may appoint, with the approval of the county court, assistants, whose compensation is to be fixed by the county court, consistent with Section 61.200, RSMo 1969, which reads in pertinent part:

". . . In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

It would appear then, that as to the county highway engineer compensated pursuant to Section 61.190(2), our previous conclusion that when a statute sets a maximum amount over which an employee may not be paid, that within that maximum amount an employee may be compensated in both specie, and by the payment of a premium on an insurance policy, is applicable. Thus, it is our conclusion that in light of the fact that we have previously held, Opinion No. 93, Cason, 9-9-69, that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, the county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation for the county engineer. Likewise, since the form of compensation to be paid the assistants of the highway engineer pursuant to Section 62.200 is not limited in form, it is the further conclusion of this office that the county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation for these assistants.

A magistrate judge of a third class county is given the authority, consistent with Section 483.485, RSMo 1969, to appoint a clerk and such deputies and employees as are necessary, and is given the authority to fix their salaries, said salaries to be paid by the state. Additionally, the county court of a third class county is authorized to provide additional clerks, deputy clerks, and other employees and to provide for the payment of salaries in addition to the amounts payable by the state. Section 483.485, RSMo 1969, in pertinent part reads:

"In all counties each magistrate shall by an order duly made and entered of record appoint

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and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in section 483.490 for clerk and deputy clerk hire of such courts; provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state . . ."

The amount of salary, payable by the state, for clerks, deputy clerks, and other employees of magistrate courts is set out in Section 483.490, RSMo 1969. In light of the fact that the last decennial census discloses that the population of New Madrid County is 23,420 and the assessed valuation is reported as \$61,291,016, the pertinent parts of Section 483.490, RSMo 1969, would appear to be as follows:

"1. Salaries of clerks, deputy clerks and employees provided for in section 483.485 shall be paid by the state within the limits herein provided upon requisition filed by the judges of the magistrate courts; except that the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in section 482.010, RSMo, shall be paid by the county as the salaries of such magistrates are required to be paid. The total amount that may be paid by the state in any one year for such clerks, deputy clerks and employees of the magistrate courts in the different counties shall not exceed the following sums:

* * *

"(6) In counties now or hereafter having a population of more than fifteen thousand inhabitants but not more than thirty thousand

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inhabitants, with an assessed valuation of more than twenty-four million dollars, the sum of five thousand nine hundred dollars; provided, that in all such counties in which the probate court is required by law to be held in more than one place such salaries shall not exceed the sum of eleven thousand eight hundred dollars;

* * *

"2. The salaries of such clerks, deputy clerks and employees shall be fixed by the magistrate, or magistrate court if the magistrates are organized into a court with divisions. When the judge of the probate court is also judge of the magistrate court, such judge, in his discretion, may designate one or more of such clerks, deputy clerks, or employees as clerks, deputies or employees in the probate court."

It is the conclusion of this office that since the sections authorizing money to be allocated for payment of salaries or parts of salaries by the state provide for payment in cash no discretion resides in the magistrate or any other county official to provide for payment of insurance premiums out of the money paid by the state. It would appear, however, that consistent with Section 483.485, where the county court has authorized payment of salaries for clerks, deputy clerks or other employees of the magistrate court in addition to the amount paid by the state, the county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation to these clerks, deputy clerks, and other employees from monies authorized by the county court.

Additionally, consistent with Section 482.010(3), RSMo 1969, an additional magistrate may be created by order of the circuit court, and the clerk, deputy clerks, and employees of said additional magistrate are to be paid by the county consistent with Section 483.490, RSMo 1969, which states:

". . . the salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in section 482.010, RSMo, shall be paid by the county as the salaries of such magistrates are required to be paid.
." . ."

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By former opinion of this office, Opinion No. 275, Lauderdale, 8-7-63, this office held that when a magistrate, whose office is created by order of the circuit court appoints a deputy clerk and fixes the salary within the statutory limits, the county court must pay such salary and may not reduce it. It would appear then, that the compensation for clerk, deputy, and other employees hired by a magistrate pursuant to Section 483.490, is not limited as to form, and thus in light of the fact that we have by previous opinion, Opinion No. 93, Cason, 9-9-69, held that the term "compensation" is generally interpreted so as to include the purchase of insurance for an employee, it is the conclusion of this office that the magistrate judge who has been appointed under Section 482.010(3) may, in his discretion, authorize the payment of the premium on a hospitalization insurance policy as a part of compensation of those employees compensated pursuant to Section 483.490.

Consistent with Section 483.475, RSMo 1969, a probate judge of a county having more than thirty thousand inhabitants is given authority to appoint his own clerk, assistants, and stenographers and determine the number of said employees, and their salaries by court order. It would appear, however, that New Madrid County does not come within the foregoing section because, as the last decennial census indicates, New Madrid County has a population of 23,420.¹ Thus the provision for a probate clerk of New Madrid County falls within Article V, Sections 17 and 26, of the Constitution, which provides:

"Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act ex officio as his own clerk.

* * *

¹By reference to Section 1.100, it can be seen that the last decennial census became effective for the purposes of deputy and assistant hire January 1, 1971:

". . . for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961."

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"Appellate and probate courts shall appoint their own clerks."

By previous opinion of this office, Opinion Attorney General No. 10, Boyer, 3-26-54, we held that while a probate clerk may be appointed in a county having less than thirty thousand, no provision is found for compensating such a clerk, and thus we conclude that the probate clerk of New Madrid County must look to the probate judge for compensation. We are enclosing Opinion Letter No. 196 rendered March 22, 1971, to Vic Downing holding that the probate judge will become ex officio magistrate July 1, 1971.

Consistent with Section 473.730, RSMo 1969, New Madrid County has a public administrator. There is, however, no statutory reference authorizing the appointment of deputies, clerks or assistants. As such, we find your question in the instant case inapplicable to the public administrator of New Madrid County.

Consistent with Section 60.090, RSMo 1969, the county surveyor of New Madrid County may in his discretion appoint deputies:

"Deputies may be appointed by any surveyor who, before they proceed to discharge their duties, shall take an oath well, truly and faithfully to discharge the duties of deputy surveyors."

It would appear, however, after a review of the statutes that no provision exists for the payment of compensation of such deputies, and the reasoning of the Missouri Supreme Court in *Alexander v. Stoddard County*, supra, becomes pertinent. In that case the court stated at page 109:

"In any event the legislature has the power to fix and limit the salaries of deputies and 'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. . . .'"

Therefore, it appears that while a county surveyor of a third class county may employ as many deputies as he may need, the county court may not be obligated to pay said deputies out of county funds, but said deputies must look to the assessors for their compensation.

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CONCLUSION

It is therefore the conclusion of this office that:

(1) As to those employees which the county court may hire and whose compensation is fixed by the county court, the county court may in its discretion pay the premium on a hospitalization insurance policy as a part of said employees' compensation.

(2) When a statute sets an open-ended amount which compensation may take, for an employee not to exceed a statutory maximum, within the maximum authorized, an employee may be compensated both in specie, and in the form of payment of the premium on an insurance policy, so long as the cumulative value of compensation does not exceed the statutory maximum.

(3) Those employees hired by the county clerk consistent with Section 51.450[1] (4), RSMo 1969, may have a part of their compensation paid to them in the form of a premium on a hospitalization insurance policy.

(4) If, in the first instance, the clerk of the county court authorizes the payment of a premium on a hospitalization insurance policy for his deputies and assistants, and the county court secondarily agrees that the deputies and assistants of the county clerk may participate in a group policy which has been purchased by the county court for the employees which it compensates, the deputies and assistants of the county clerk may participate in any group hospitalization insurance policy purchased by the county court.

(5) The county court has discretion to determine if part of the sum paid to regular deputy county clerks, consistent with Section 51.450[2], RSMo 1969, may be used toward the payment of a premium on a group hospitalization policy.

(6) As to the additional compensation authorized to be paid to the deputy clerk consistent with Section 51.450[3], RSMo 1969, this section is restrictive in its content in that it authorizes only the payment of the additional compensation, in specie, and does not authorize compensation to be paid in any other form.

(7) The judge of the circuit court has the discretion to order the payment of a premium on hospitalization insurance as a form of compensation to the deputies and assistants of the circuit clerk appointed under Section 483.345, RSMo 1969.

(8) On authorization of the circuit judge, and approval by the county court, those employees of the circuit clerk appointed under Section 483.345, RSMo 1969, may participate in any group hospitalization insurance program authorized by the county court.

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(9) Deputy recorders hired pursuant to Section 59.257, RSMo 1969, may have paid for them, as a form of compensation, the premium on a group hospitalization insurance policy if the recorder of deeds, in the exercise of his discretion, with the approval of the county court, authorizes such action.

(10) The prosecuting attorney of a third class county may, in the exercise of his discretion, authorize the payment of a premium on an insurance policy as a form of compensation for his stenographic and clerical help, and if this authorization is approved by the county court, the stenographic and clerical help authorized under Section 56.245, RSMo 1969, may have the premium on a hospitalization insurance policy paid for them as a form of compensation.

(11) The county court may authorize the payment of the premium on a hospitalization insurance policy as a form of compensation for an assistant prosecuting attorney, which the court has elected to compensate, consistent with Section 56.240, RSMo 1969.

(12) Because New Madrid County has a population of 23,420, the assistant prosecuting attorney hired pursuant to Section 56.240, RSMo 1969, shall be compensated by the prosecuting attorney.

(13) The judge of the circuit court may in his discretion authorize, by court order, the payment of the premium on a hospitalization insurance policy as a part of the compensation of deputies and assistants provided for the sheriff in Section 57.250, RSMo 1969.

(14) With the approval of the county court, those deputies and assistants to the sheriff, within Section 57.250, RSMo 1969, authorized by the circuit judge to receive as a form of their compensation the payment of a premium on a group hospitalization insurance policy, may participate in any policy the county court has provided for its employees.

(15) The county collector of a third class county, not a township county, may in his discretion pay, as a form of compensation, a premium on a hospitalization insurance policy for those deputies and clerical assistants authorized consistent with Section 52.280, RSMo 1969, and on the approval of the county court, those deputies and assistants of the county collector who have had authorized for them by the county collector the payment of a premium on a hospitalization insurance policy as a form of compensation, may participate in any group hospitalization program authorized by the county court for the employees which it is authorized to compensate.

(16) The county assessor of a third class county, may in his discretion, and with the approval of the county court, authorize

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payment of the premium on a group hospitalization insurance policy for his clerical and stenographic assistants appointed consistent with Section 53.095, RSMo 1969.

(17) The employment and compensation of the deputy assessor of a third class county is one of private contract.

(18) The county court may in its discretion, as a form of compensation, pay the premium on a hospitalization insurance policy for the clerical or stenographic assistants of the county treasurer of a third class county.

(19) No provisions exist for the appointment or compensation of deputies or assistants of the coroner of the third class county.

(20) The county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation for the county highway engineer.

(21) The county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation for assistants of the county highway engineer compensated pursuant to Section 61.200, RSMo 1969.

(22) Since the sections authorizing money to be allocated for payment of salaries or parts of salaries by the state provide for payment in cash, no discretion resides in the magistrate or any other county official to provide for payment of insurance premiums out of the money paid by the state.

(23) Where the county court has authorized payment of salaries for clerks, deputy clerks or other employees of the magistrate court, pursuant to Section 483.485, RSMo 1969, the county court may in its discretion pay the premium on a hospitalization insurance policy as a form of compensation to these employees.

(24) A magistrate created by order of the circuit court pursuant to Section 482.010(3), RSMo 1969, may in his discretion authorize the payment of the premium on a hospitalization insurance policy as a part of the compensation for those employees compensated pursuant to Section 483.490, RSMo 1969.

(25) There is no statutory authority for the appointment of deputies, clerks or assistants to the public administrator of a third class county.

(26) While a county surveyor of a third class county may employ as many deputies as he may need, there is no statutory authority for the payment of these deputies.

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 17
2-4-50, Clemens

Op. No. 40
3-13-50, Hill

Op. No. 93
9-9-69, Cason

Op. No. 275
8-7-63, Lauderdale

Op. No. 10
3-26-54, Boyer

Op. No. 196
3-22-71, Downing

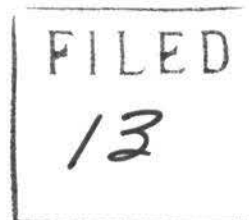
DRAINAGE DISTRICTS:
CITIES, TOWNS & VILLAGES:

1. That a city in a drainage district organized under Chapter 242, RSMo, is not exempt from the maintenance tax levied by the board of supervisors of the district. 2. That a board of supervisors of such drainage district may charge for the privilege of allowing the overflow from a city's sewage lagoon to spill into the drainage ditch if the drainage from the sewage lagoon did not exist when the drainage district was organized.

OPINION NO. 13

May 24, 1971

Honorable O. L. Wallis
State Representative
District No. 152
1331 Pershing
Poplar Bluff, Missouri 63901



Dear Representative Wallis:

This is in response to your request for an opinion from this office as follows:

"I would like an Opinion on the following: A third class city, which is in a drainage district organized in a Circuit Court, Chapter 242, RS Mo.1969, is charged a drainage tax by the district. Article X, Section 6, Constitution of the State of Missouri, states, 'Exception from taxation.- All property, real and personal, of the state, counties, and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation,...'. Can the drainage district legally tax the city?

"Furthermore, the drainage district makes a flat charge per year, in addition to the taxes, to the city for privilege of allowing the overflow from the city's sewage lagoon to spill over into the drainage ditch. Can the drainage district refuse to allow the use of the ditch for the sewage overflow if the city declines to pay the annual charge?"

In your first question, you inquire whether a third class city which is in a drainage district organized by the circuit court under Chapter 242, RSMo, can legally tax the city under Article X, Section 6, Constitution of Missouri, which exempts all property of the state, county and other political subdivisions, from taxation.

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We assume the tax you have in mind is an assessment made by the board of supervisors of the drainage district for maintenance tax based upon the net assessment of benefits originally assessed against the city for public highways in such city under Section 242.260. See Harrison and Mercer County Drainage Dist. v. Trail Creek Tp. 317 Mo. 933, 297 S.W. 1.

Section 242.490, RSMo, provides in part:

"1. To maintain and preserve the ditches, drains, levees or other improvements made pursuant to sections 242.010 to 242.690 and to strengthen, repair and restore the same, when needed, and for the purpose of defraying the current expenses of the district, the board of supervisors may, upon the completion of said improvements and on or before the first day of September in each year thereafter, levy a tax upon each tract or parcel of land and upon corporate property within the district to be known as a 'maintenance tax'. Said maintenance tax shall be apportioned upon the basis of the net assessments of benefits accruing for original construction, shall not exceed ten per cent thereof in any one year and shall be certified to the collector of the revenue of each county in which lands of said district are situated in the same book in like manner and at the same time as the annual installment tax is certified, but in a separate column, under the heading 'maintenance tax'."

Under this statute a board of supervisors has authority to levy an assessment or tax not to exceed ten percent of the original assessment upon each tract or parcel of land and upon corporate property within the district to be used to maintain, preserve, to strengthen and repair ditches, drains and levies in the drainage district.

This statute further provides that the collector shall demand and collect the maintenance tax and make return thereof and shall receive the same compensation therefor and be liable for the same entities for failure or neglect in the same manner as other taxes are collected.

Article X, Section 6, Constitution of Missouri, provides in part:

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"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; . . ."

The first question to be determined is whether the assessment made by the board of supervisors of a drainage district is a tax within the above constitutional provision.

This question was before the Supreme Court in Houck v. Little River Drainage District, 248 Mo. 373, 154 S.W. 739, aff'd 36 S.Ct. 58, 239 U.S. 254 (1913). In this case the court stated 248 Mo. l.c. 382-383:

"I. That the State, by the Legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed lands by ditches and drains and levies, in districts prescribed by it, or to be ascertained and fixed by such appropriate instrumentalities as it may provide, is no longer a question in this State. Nor is it an open question that the instrumentality so created may be invested with all the necessary power and authority to construct and maintain whatever works may be necessary to accomplish such object, and to raise the funds to pay for the same by assessment on the lands to be benefited thereby. [Egyptian Levee Co. v. Hardin, 27 Mo. 495; Columbia Bottom Levee Company v. Meier, 39 Mo. 53; Mound City Land & Stock Company v. Miller, 170 Mo. 240; Squaw Creek Drainage District v. Turney, 235 Mo. 80; Morrison v. Morey, 146 Mo. 543; State ex rel. v. Chariton Drainage District, 192 Mo. 517; State ex rel. v. Taylor, 224 Mo. 393; Little River Drainage District v. Railroad, 236 Mo. 94.] These corporations, as is said in the most of the cases cited, are, when formed, public subdivisions of the State, exercising the powers granted them for the purposes of their creation, within their territorial jurisdiction, as fully, and by the same authority, as the municipal corporations of the State exercise the powers vested by their charters. That the special taxes they are authorized to levy and collect upon and for the benefit of the lands included in their districts do not come within the provisions of article 10 of the State Constitution invoked

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by the appellants, has long been settled, and has passed from the realm of legitimate discussion. . . ."

The distinction between a tax and benefit assessment is made in Fort Osage District of Jackson County v. Foley, 312 S.W.2d 144 (Mo. 1958). The issue before the court in this case was whether an assessment made under Section 242.490, supra, constituted revenue under Article V, Section 3, Constitution of Missouri which vests the Supreme Court with jurisdiction of an appeal when the revenue laws of the state are involved. The court, after citing Section 242.490, supra, stated at l.c. 145-146:

" . . . since the decision in State ex rel. Broughton v. Oliver, 273 Mo. 537, 201 S.W. 868, it has been well settled that appeals in proceedings to enforce benefit assessments by drainage districts are not cases involving a construction of the revenue laws of the state within the meaning of Art. V, § 3, of the Constitution, V.A.M.S., even though such assessments are collected as other taxes. The Broughton case makes clear the distinction between revenue laws of the state and local benefit assessments in this oft-quoted statement, 201 S.W. 870: 'When the Constitution speaks of the "revenue laws of this state," as it does in section 12 of article 6, supra, it has reference to that body of laws by which funds for public governmental purposes are raised, and not to that law or body of laws by which are authorized the assessment of benefits to meet the expenses of given improvements. In other words, the two purposes make up separate schemes: (1) Revenues for public governmental purposes, and the assessment, collection and expenditure thereof; and (2) special assessments and their collection and expenditure. It is to the first class supra that the constitutional provision under review applies, and not to the latter.'

"Later cases approving and following the holding in the Broughton case are Bushnell v. Mississippi & Fox River Drainage Dist., 340 Mo. 811, 102 S.W.2d 871, 874 [5]; Pearson Drainage Dist. v. Erhardt, Mo., 196 S.W.2d 855 [1, 2]; Howell v. Division of Employment Security, etc., 358 Mo. 459,, 215 S.W.2d 467, 471-472 [3]."

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It is the opinion of this office that a benefit assessment levied by the board of supervisors of a drainage district is not in fact within the provisions of Article X, Section 6, Constitution of Missouri, which exempts real estate owned by a political subdivision from taxation.

In your second question you inquire in substance whether a drainage district organized under Chapter 242, RSMo, has authority to charge a city a flat charge for the privilege of allowing overflow from the city's sewer lagoon to empty into the drainage ditch.

A somewhat analogous case arose in Thompson v. City of Malden, 118 S.W.2d 1059 (Spr.Ct.App. 1938), in which the Springfield Court of Appeals sustained the lower court's injunction prohibiting the City of Malden from connecting a sewer outlet with the drainage ditch in a drainage district organized by a county court under Chapter 243, RSMo. The city did not have a written contract with the county court granting it permission to connect with the sewer district as provided in 243.270, V.A.M.S., Section 10838, RSMo 1929.

The court, in discussing the organization of drainage districts and their authority, stated at l.c. 1063:

"Drainage ditches are artificially created and constructed through funds raised by taxation against the lands that comprise the district. Chapter 64, Article 2, R.S.Mo.1929 creates a code unto itself and the provisions of this chapter and article limit and define the authority and duties of the governing board of drainage districts. State ex rel. Walker v. Locust Creek Drainage District, 228 Mo.App. 434, 67 S.W.2d 840; State ex rel. Harrison v. Hill, 212 Mo.App. 173, 253 S.W. 448. Drainage districts organized under the provisions of this chapter and article are public or municipal corporations and the County Court of the county in which they are organized administers their affairs. Their rights, powers and liabilities are specifically limited by the statutes that create them. State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S.W. 892; Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S.W. 12; Houck v. Little River Drainage Dist., 248 Mo. 373, 154 S.W. 739; Wilson v. King's Lake Drainage & Levee Dist., 176 Mo.App. 470, 158 S.W. 931; Id., 257 Mo. 266, 165 S.W. 734; State ex rel. McWilliams v. Little River Drainage District, 269 Mo. 444,

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190 S.W. 897; Birmingham Drainage Dist. v. Chicago, B. & Q. R. Co., 274 Mo. 140, 202 S.W. 404; Sigler v. Inter-River Drainage Dist., 311 Mo. 175, 279 S.W. 50; Arthaud v. Grand River Drainage Dist., 208 Mo.App. 233, 232 S.W. 264."

The principles of law stated above as to the rights, powers and liabilities of a drainage district are specifically limited in the statutes that create them.

Chapter 242, RSMo, governing drainage districts organized by the circuit court does not contain a statute expressly authorizing a drainage district to contract with a city for the use of a drainage ditch for a consideration as provided for in Section 243.370 which applies only to drainage districts organized by the county court.

Section 242.370, RSMo, which applies to drainage districts organized by the circuit court provides:

"Existing drains may be connected.--1. At the time of the construction, in any district incorporated under sections 242.010 to 242.690, of the plan for reclamation herein referred to, all ditches or systems of drainage already constructed in said district and all watercourses shall, if necessary to the drainage of any of the lands in said district, be connected with and made a part of the works and improvements of the plan of drainage of said district.

"2. But no ditches, drains or systems of drainage constructed in said district after the completion of the aforesaid plan of drainage of said district, shall be connected therewith, unless the consent of the board of supervisors shall be first had and obtained, which consent shall be in writing and shall particularly describe the method, terms and conditions of such connection, and shall be approved by the chief engineer. Said connection, if made, shall be in strict accord with the the method, terms and conditions laid down in said consent.

"3. If the landowner or owners wishing to make such connection are refused by the board of supervisors or decline to accept the consent granted, the said landowner or owners may file a petition for such connection in the circuit

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court having jurisdiction in said district, and the matter in dispute shall in a summary manner be decided by said court which decision shall be final and binding on the district and landowner or owners.

"4. No connection with the works or improvements of said plan of drainage of said district or with any ditch, drain or artificial drainage wholly within said district shall be made, caused or effected by any landowner or owners, company or corporation, municipal or private, by means of or with any ditch, drain, cut, fill, roadbed, levee, embankment or artificial drainage, wholly without the limits of said district, unless such connection is consented to by the board of supervisors, or in the manner herein provided."

Under this statute, the board of supervisors of a drainage district organized in the circuit court, has authority to consent in writing for other ditches, drains or systems of drainage to be connected with a drainage ditch under the terms and conditions approved by the chief engineer of the drainage district.

The question now arises whether the supervisors of a drainage district, although they have the authority to permit the connection to be made, have the right to require compensation to be paid for such service.

In State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 142 S.W.2d 1099 (St.L.Ct.App. 1940), the State Highway Commission sought to recover eight hundred dollars per year from the Union Electric Company upon a contract whereby the Union Electric Company agreed to pay for its electric power lines on the State Highway bridge at St. Charles, Missouri. The court denied recovery because a statute expressly provides a public utility the right to use a public highway for its poles, lines, etc. In discussing this matter, the court stated at l.c. 1102:

"In support of its contention that it has been impliedly granted the power it seeks to exercise, plaintiff cites, by way of alleged analogy, that line of decisions which affirm the right of a municipal corporation to impose a charge in the nature of a rental upon a public utility which appropriates space in the streets and alleys of the city as the location for its poles and other fixtures. The trouble is that

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in attempting to draw such analogy, plaintiff ignores the vital difference between the power of a city in such respect and the power which it itself possesses. The consent of a municipality is a condition precedent to the right of a utility to make use of the streets and alleys of the municipality in the operation of its business (State ex inf. v. Arkansas-Missouri Power Co., 339 Mo. 15, 93 S.W.2d 887; State on inf. v. Missouri Utilities Co., supra); and since this is so, and since the requisite permission may be withheld, when a municipality once permits the exclusive appropriation of a portion of its streets and alleys, it may then in turn exact compensation in the nature of rental for the space thus occupied by the utility to the absolute exclusion of the rights of the general public. Not so, however, in the case of the commission, which is expressly denied the right to exclude the lines and appurtenances of public utilities from the units of the state highway system, and which must therefore be held to lack the right to impose a charge for the exercise of a privilege which it has neither the power to grant or to prevent. State ex rel. v. Kansas City Power & Light Co., supra."

It is our view that if the lagoon existed prior to the formation of the drainage district, no charge for connecting with the drainage ditch by the sewer lagoon could be made by the drainage district under subsection 1 of the above statute. This would also apply to any drainage systems that existed at the time the drainage district was organized.

If, as a matter of fact, the sewer lagoon was built and provision made for discharge of effluent after the drainage district was established, the provisions of subsection 2 would be applicable and the drainage district would have authority to make a charge for allowing the effluent from the city sewer lagoon to flow into the drainage ditch.

If the city and the board of supervisors of the drainage district cannot agree on the terms and conditions for allowing the effluent from the sewer lagoon to be emptied into the drainage system, the matter may be submitted to the circuit court which decision would be final and binding on the city and the drainage district as provided in subsection 3 of the above statute.

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CONCLUSION

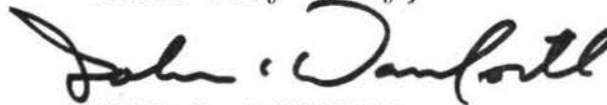
It is the conclusion of this office:

1. That a city in a drainage district organized under Chapter 242, RSMo, is not exempt from the maintenance tax levied by the board of supervisors of the district.

2. That a board of supervisors of such drainage district may charge for the privilege of allowing the overflow from a city's sewage lagoon to spill into the drainage ditch if the drainage from the sewage lagoon did not exist when the drainage district was organized.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

INSURANCE:
COUNTY HOSPITALS:

(1) The board of trustees of a county hospital may not purchase liability insurance to cover their own negligence, as they are protected by sovereign immunity. (2) The county hospital board of trustees may authorize the purchase of liability insurance covering the negligence of the employees of a county hospital as a form of compensation. (3) The board of trustees of a county hospital does not waive its sovereign immunity by the purchase of a liability insurance policy covering its employees.

OPINION NO. 15

May 10, 1971

Honorable James Millan
Prosecuting Attorney
Pike County Court House
Bowling Green, Missouri 63334



Dear Mr. Millan:

This is in reply to your request for an opinion of this office in which you ask the following:

"Is your opinion No. 99, dated May 12, 1960 still in effect and is it your opinion that a county hospital operated and maintained under this chapter has no tort liability and cannot properly purchase liability insurance to guard against any liability?

"If this is still your opinion can it purchase liability insurance to cover negligences of individual employees who might be personally responsible even though a county hospital would not be liable itself for their negligences?

"My final question, is whether or not such a county hospital would waive its immunity for tort liability, if it is still immune, by purchasing general liability insurance?"

I

The issue of first concern is whether a county hospital, operated pursuant to Sections 205.160 through 205.340, RSMo 1969, is

Honorable James Millan

liable in tort for its negligence, or the negligence of its employees, and whether it may purchase liability insurance to guard against any theoretical liability.

By previous opinion of this office, No. 99, Woods, 5-12-60, and by Opinion No. 528, Conley, 12-16-69, this office has held that a county hospital operated and maintained under the foregoing sections is not liable in tort, and that a county hospital cannot properly purchase liability insurance to guard against a non-existent liability. After a review of the foregoing opinions, and in light of *Abernathy v. Sisters of St. Mary's* (Mo.Sup. en banc 1969) 446 S.W.2d 599; and *Garnier v. St. Andrew Presbyterian Church of St. Louis* (Mo.Sup. en banc 1969) 446 S.W.2d 607, it is the conclusion of this office that the opinions of the Attorney General No. 99, Woods, and No. 528, Conley, correctly express the state of the law in regard to county hospitals.

II

Your second question asks whether liability insurance, to cover the negligence of individual employees, may be purchased by the board of hospital trustees, even though the trustees would not be liable itself for their employee's negligence.

By reference to Section 205.190(5), RSMo 1969, it can be seen that the hospital board of trustees may fix the compensation for the employees under consideration:

"Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital."

As can be seen by reference to the above section, the legislature has not attempted to limit the form that consideration for employee services is to take, but has instead given the hospital board of trustees the authority to fix "compensation." The question then becomes, whether a liability insurance policy purchased for an employee may be legally considered as part of said employee's "compensation." In a former opinion of this office, Opinion No. 93, Cason, 9-9-69, we held, under a similar factual instance, that the purchase of insurance for an employee may be considered a proper form of compensation. Thus, it is the opinion of this office, that

Honorable James Millan

those employees hired and compensated consistent with Section 205.190(5), supra, by the board of hospital trustees, may have purchased for them a liability insurance policy covering their negligence during the normal activities of their employment.

III

Your third question is whether a purchase of liability insurance covering the negligence of the hospital board of trustees would act as a waiver of the board's sovereign immunity. As we have previously held in this opinion, the board of trustees of the county hospital have no authority to purchase liability insurance on a non-existent liability, and thus this question becomes moot. The question may arise, however, as to whether the purchase of liability insurance covering the negligence of employees of a hospital board of trustees would act as a waiver of the trustees' sovereign immunity. In Opinion No. 93, Cason, 9-9-69, this office held that purchase of liability insurance as a form of compensation for employee services, was not an attempt by the governmental unit to cover any negligent liability of its own, and thus no waiver or estoppel problems arise.

CONCLUSION

It is the conclusion of this office that:

(1) The board of trustees of a county hospital may not purchase liability insurance to cover their own negligence, as they are protected by sovereign immunity.

(2) The county hospital board of trustees may authorize the purchase of liability insurance covering the negligence of the employees of a county hospital as a form of compensation.

(3) The board of trustees of a county hospital does not waive its sovereign immunity by the purchase of a liability insurance policy covering its employees.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 99
5-12-60, Woods
Op. No. 528
12-16-69, Conley
Op. No. 93
9-9-69, Cason

Answer by letter-Wood

OPINION LETTER NO. 16

Honorable Peter H. Rea
Prosecuting Attorney
Taney County Court House
Forsyth, Missouri 65653

FILED

16

Dear Mr. Rea:

You have inquired as to the validity of the composition of a board of arbitration established pursuant to Section 162.431, RSMo, to consider adjustment of school district boundaries. The portion of this statute about which your question revolves states:

" . . . If the districts affected are in two counties, the presidents of the county boards of education concerned together with one member appointed by the state board of education not a resident of the counties affected constitute a board of arbitration. . . ." (Section 162.431(3), RSMo)

We understand from the State Department of Education that your question arises from a petition submitted by certain voters of the Nixa Reorganized School District R-2 to alter the boundary between Nixa Reorganized School District R-2 (Christian and a small portion of Stone Counties) and Ozark Reorganized School District R-6 (Christian County), both six-director school districts. At the April 7, 1970, election on the question, the voters of the Nixa District voted against the boundary change, and the voters of the Ozark District voted in favor of the change. Accordingly, pursuant to Section 162.431, RSMo a board of arbitration convened, and on July 6, 1970, ruled against the boundary change. This board of arbitration consisted of Freeman Glen, President of the Christian County Board of Education, and Laurence Meiner of Jasper County, designee of the State Board of Education. Christian and Stone Counties have not conducted annual elections to the county board of education for

Honorable Peter H. Rea

the past several years. Freeman Glen is the last President of the Christian County Board of Education selected pursuant to Sections 162.111 and 162.121, RSMo. Stone County's last such selected President died prior to the convening of the board of arbitration in question, but at the time, you advise us that Stone County had a "Vice-President" of the county board of education. Hence your question:

Was the "Vice-President" of the Stone County Board of Education eligible for, and an indispensable member of the board of arbitration appointed pursuant to Section 162.431(3), RSMo, to act on the petition for altering the boundaries of the Nixa R-2 and Ozark R-6 School Districts?

Six member county boards of education are authorized to be elected at annual April school elections with three members from each county court district, and the members serving staggered three year terms (Section 162.111, RSMo). The board is to organize within four days of the election by selecting a President from among its members (Section 162.121, RSMo). Four members constitute a quorum for board meetings (Section 162.131, RSMo). Section 162.131, RSMo, requires that the county board of education meet at least once each quarter of each calendar year and as often otherwise as is necessary to discharge its duties. One or two vacancies may be filled by the board and more than two by the county court, pending the next annual school election (Section 162.141, RSMo).

Quite obviously, the statutes make no provision for a "Vice-President" of a county board of education. It is our view that upon the demise of the member who had been selected as the President of the Stone County Board of Education, the board was required to fill the vacancy by appointment of a new member and was also required to reorganize by selecting a new President (Section 162.121 and Section 162.141, RSMo). A "Vice-President" selected by the board in advance of the vacancy or the President's demise would not constitute an adequate reorganization entitling this "Vice-President" to have been recognized as a member of the board of arbitration convened pursuant to Section 162.431(3), RSMo.

Therefore, at the time the board of arbitration convened to consider the question of the boundary change, there was a vacancy on the three-man board contemplated by law (Section 162.431 (3), RSMo, as above-quoted). Could the two properly qualified members make the final decision on the boundary question? We think they could in view of Section 1.050, RSMo, which provides:

Honorable Peter H. Rea

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

This statute was applied by the Missouri Supreme Court in ruling that two of the three commissioners appointed by the county court to appraise damages in connection with a road change could qualify and validly make the required appraisal.

"It is true the statute (Acts 1893, p. 223, § 3) requires the county court to appoint three disinterested freeholders to act as a board of commissioners, to assess the damages resulting to the owner by reason of the location of a new road, or the change of a road, upon his land. The legislature, however, has laid down certain rules for the construction of statutes. Section 6570, Rev. St. 1889, declares that 'the construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or the context of the same statute: * * * Second, words imparting joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority.' There is nothing in the road law, under which the county court was acting, indicating an intent that all the commissioners must qualify and act. Upon the contrary, it is declared that 'the report of said board of commissioners, when signed by a majority of them, shall be taken and considered as the report of all.' Acts 1893, p. 223, § 3. This court said in *Quayle v. Railroad Co.*, 63 Mo. 465: 'What is the joint authority conferred upon the three commissioners? It is to view the land, assess the damages, and make report. It is not expressed in the statute that all three shall join in the view of the land, the assessment of the damages, or in making the report, and therefore, according to the rule of construction laid down by the legislature, any two of them might act, and perform all of these duties, unless such a construction would not only be repugnant, but plainly repugnant, to the intention of the legislature in requiring them

Honorable Peter H. Rea

to be appointed.' See, also, Moore v. Wingate, 53 Mo. 398. It is plainly apparent that the legislature intended that, if a majority of the commissioners should qualify and make the assessment, their acts should be valid. . . ." (Thurlow v. Ross, 45 S.W. 1125, 1126 (Mo. 1898))

Under a statute substantially identical to Section 1.050, RSMo, the Supreme Court of Kansas ruled that a parole revocation by two members of the state parole board, required by statute to have three members, was valid where there was a vacancy in the board's third membership (Murray v. State, 394 P.2d 88 (Kan. 1964)).

Accordingly, we are of the opinion that the action taken by Freeman Glen and Laurence Meiner, as the board of arbitration convened pursuant to Section 162.431, RSMo, was valid.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CRIMINAL LAW:
TAXATION (INCOME):
CONSTITUTIONAL LAW:

A taxpayer who refuses to pay
Missouri state income tax can
be prosecuted for a misdemeanor
pursuant to Section 143.330(4),
RSMo 1969.

OPINION NO. 18

January 13, 1971

Honorable Joseph P. Teasdale
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City, Missouri 64106



Dear Mr. Teasdale:

This is in reply to your request for an official opinion of this office in which you seek an opinion on the constitutionality of Section 143.330(4), RSMo 1969, which is an interest and penalties section contained within the provisions of the State Income Tax Law. As you indicate, you have become apprehensive about the validity of Section 143.330(4), supra, which provides for the fine or imprisonment of a person ". . . who willfully fails to pay such tax [state income tax], . . .", in light of Article I, Section 11, Constitution of Missouri, 1945, which provides:

"That no person shall be imprisoned for debt,
except for nonpayment of fines and penalties
imposed by law."

Apparently, you are concerned that any criminal prosecutions brought by your office for willfully failing to pay one's state income tax, can be met successfully by the defense that to so prosecute would be imprisonment for debt in violation of the Constitution of Missouri, 1945, Article I, Section 11.

It would appear, that you have developed your concern from a reading of two recent cases, *Partney v. Partney* (Ct.App. 1969) 442 S.W.2d 117; and *Barhorst v. City of St. Louis* (Mo.Sup. en banc 1967) 423 S.W.2d 843.

Partney v. Partney, supra, was a contempt proceeding brought by a divorced wife to enforce an alimony and child support decree. A motion to hold the husband in contempt was overruled by the Circuit Court, said order being affirmed by the Court of Appeals. The authority for the court's holding was *Coughlin v. Ehlert* (Mo.Sup. 1866) 39 Mo. 285, in which the Supreme Court of Missouri had held

Honorable Joseph P. Teasdale

that, "An order for the payment of alimony is simply an order for the payment of money. . . .", and thus imprisonment for this civil debt would be in contravention of the Constitution's imprisonment for debt provision. [For discussion see 26 Missouri Bar Journal 560, Woods].

In *Barhorst v. City of St. Louis*, supra, certain taxpayers urged the unconstitutionality of the charter amendment and ordinances imposing an earnings tax in the City of St. Louis, urging as one basis of the laws unconstitutionality, the invalidity of the laws penalty provisions because it accomplished imprisonment for debt, in violation of Article I, Section 11, 1945 Constitution of Missouri. The court answered that argument thusly:

"The ordinance makes it a violation of the Municipal Code, punishable upon conviction by fine or imprisonment, for a taxpayer to fail to make a return, or to permit the collector to examine his books and records, knowingly to make a false return or to attempt to avoid full disclosure of earnings or profits. It also requires the taxpayer making the return, at the time of filing, to pay the collector the amount of tax shown due . . . but attaches no penalty for failure to pay on time except 6% interest and a 1% per month penalty. Imprisonment for nonpayment of a fine for violation of the ordinance by failing to file a return would not constitute imprisonment for debt, *Thunder Oil Company v. City of Sunset Hills*, (Mo.Sup.banc) 349 S.W.2d 82, 89. The ordinance does not attempt to authorize imprisonment of a taxpayer for failure to pay the tax, nor does it make payment of the tax a condition precedent to filing, although it does require payment at the time the return is filed. . . ." [loc. cit. 849-850; emphasis added]

Thus, it would appear, that the court did not have squarely before it in *Barhorst*, the question of whether, as is present in the statute under instant consideration, a person may be imprisoned for willful failure to pay a tax.

Section 143.330(4), RSMo 1969, authorizes a criminal prosecution for a person who willfully fails to pay state income tax:

"4. Any individual or any officer of a corporation, joint stock company or joint stock

Honorable Joseph P. Teasdale

association required under this chapter to pay a tax, make a return, keep any records, or supply any information for the purpose of the computation, assessment or collection of any tax imposed by this chapter who willfully fails to pay such tax, . . . in addition to all other penalties provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, be fined not less than five and not more than one thousand dollars, or imprisoned for not more than one year or both, at the discretion of the court, together with the costs of prosecution." [emphasis added]

As can be seen by reference to Vernon's Annotated Missouri Statutes, the Supreme Court of Missouri has dealt with Section 143.330(4) in but two cases, both dealing with venue provisions regarding willful failure to file, *State v. Civella* (Mo.Sup. 1963) 368 S.W.2d 444; and *State v. Poelker* (Mo.Sup. en banc 1964) 378 S.W.2d 491. Thus, our conclusions are drawn from a research of the general law dealing with taxation and imprisonment for debt.

Historically, constitutional provisions denying imprisonment for debt were enacted to avoid imprisoning those individuals who had debts arising out of simple contracts. *State ex rel. Lanz v. Dowling* (Fla.Sup. 1926) 110 So. 522; *Lipman v. Goebel* (Ill.Sup. 1934) 192 N.E. 203.

In almost uniform application, taxes are held not to be debts, as that term of art is defined for the purposes of constitutional provisions forbidding imprisonment for debt. The theory is expressed that a tax is not a debt due the state by certain and express agreements between the parties, but that tax is money due under a much more compelling compact than any mere agreement between the parties.

In discussing this concept, the Supreme Court of Ohio, in *Voelkel v. City of Cincinnati* (O.Sup. 1925) 147 N.E. 754, after reviewing cases and text writers, stated:

"From an examination of such authorities as have been available to us in the consideration of this case, . . . we are forced to the conclusion that section 15, art. I, of the Constitution of Ohio, 'No person shall be imprisoned for debt in any civil action, on mesne

Honorable Joseph P. Teasdale

or final process, unless in cases of fraud,' is not an inhibition against making the non-payment of a tax a misdemeanor and the imposing of a fine or imprisonment as a penalty therefor, taxes not being a 'debt' in the sense of an obligation incurred by contract, express or implied, but an obligation imposed by an act of the sovereign in the exercise of its powers; that the inhibition against imprisonment for 'debt' is an inhibition against imprisonment for an obligation incurred by contract, express or implied." [loc. cit. 756-757]

Similarly, the courts of other jurisdiction have found that the term of art "debt" embodied in constitutional provisions denying imprisonment for debt, were not so inclusive as to attach to criminal prosecutions for failure to pay a tax. Austin v. City of Seattle (Wash.Sup. 1934) 30 P.2d 646; City of Cincinnati v. DeGoyer (Mun.Ct. 1968) 241 N.E.2d 769; United States v. Smith (D.C. Mich 1945) 62 F.Supp. 594; United States v. Palermo (E.D. Penn. 1957) 152 F.Supp. 825; Freeman v. United States 217 U.S. 539 (1910).

There would appear to be another basis by which the penalty provision of Section 143.330(4), supra, does not contravene Article I, Section 11, Constitution of Missouri, 1945. As can be seen, by reference to Section 143.330(4), it is made a misdemeanor for the taxpayer to willfully fail to pay the income tax. That the term of art "willfully failing to pay an income tax" has been given definitional meaning, reference may be had to the Internal Revenue Code of 1954, Chapter 75, Section 7203, which reads as follows:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, makes such return, keeps such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." [emphasis added]

Honorable Joseph P. Teasdale

The Supreme Court of the United States, in a willful failure to file case, in *United States v. Murdock*, 290 U.S. 389 (1933), in discussing the term "willfully" stated:

"The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. . . . without justifiable excuse . . . stubbornly, obstinately, perversely, . . . The word is often employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act, . . ." [loc. cit. 394-395]

That Missouri courts have similarly defined willfully, see *State v. Foster* (Mo.Sup. 1946) 197 S.W.2d 313; and *State v. Brown* (Ct. App. 1969) 445 S.W.2d 647. As can be seen, the definition given the term willfully in the context of income tax law is one of a fraudulent act.

Thus it would appear, that under the two previously discussed theories, the penalty provision of Section 143.330(4), does not contravene Article I, Section 11 of the Constitution of Missouri.

There has been advanced, however, a theory that a legislative body can transform a tax into a debt by legislative edict, and that imprisonment for the collection of a tax transformed into a debt would contravene a constitutional provision against imprisonment for debt. In *City of Cincinnati v. DeGoyer* (Mun.Ct. 1968) 241 N.E.2d 769, the Municipal Court of Hamilton County, Ohio, had before it the question of whether the legislative body of the City of Cincinnati had transformed a tax into a debt by legislative enactment. Recognizing the general theory that a tax is not a "debt," the court found that on the facts before it the city council of the City of Cincinnati, had transformed a tax into a debt by enactment of a city earnings tax ordinance. In so holding, the court stated:

"The principle that the legislature can make a tax a debt is referred to in 51 Ohio Jurisprudence 2d, Taxation, Section 5, wherein it states, 'and it is to be noted that statutes may specifically make taxes a debt.' This section cites the case of *State, ex rel. Hostetter v. Hunt*, 132 Ohio St. 568, 9 N.E.2d 676 for the proposition.

Honorable Joseph P. Teasdale

". . . As quoted before, Section 11, sub-paragraph A, of the Ordinance says, 'all taxes * * * shall be collectible * * * by suit as other debts.' This, together with Article 11 of the Rules and Regulations, subsection A-1, which reads, 'All taxes * * * become * * * a debt, leads the Court to the only conclusion which seems apparent from a total reading of the Ordinance and Rules and Regulations, and that is the legislative body intended to create a debt once the tax liability is determined. . . .'" [loc. cit. 773]

To see if this theory is susceptible to application in the instant case, reference must be had to Section 143.290, RSMo 1969, which states as follows:

"At the expiration of thirty days after any delinquency, the director of revenue shall certify the name of any individual, association, joint stock company, syndicate, copartnership, corporation, receiver, trustee, conservators, or other officer appointed by any state or federal court, or any other person or organization from whom any tax under this chapter shall be due, to the attorney general, and suit shall be instituted in any court of competent jurisdiction by the attorney general, or by the prosecuting attorney of the county at the direction of the attorney general, in the name of the state, to recover such tax and enforce the lien thereof, and service may be had on both residents and nonresidents in the same manner as provided by law in civil actions."

The argument could be made that by the foregoing section, the legislature has transformed a tax into a debt in light of the fact that a civil action is contemplated for the recovery of taxes declared delinquent under Section 143.280, RSMo 1969. We are, however, unable to ascribe such intent to the legislature. A concurrent reading of Sections 143.290 and 143.330, indicates, we believe, that the legislature has provided two remedies to the state on the failure of an individual to pay the state income tax: an action to recover such tax by a civil action, and, a criminal action for the fraud involved for willfully failing to pay a tax. By reference to Section 144.390, RSMo 1969, the specificity with which the legislature can speak in this area can be seen:

Honorable Joseph P. Teasdale

"1. Any tax due and unpaid under the provisions of sections 144.010 to 144.510 shall constitute a debt due the state and in any case of failure to pay the tax, or any portion thereof, or any penalty or interest provided for in sections 144.010 to 144.510, when due, the director of revenue in the name of the state may recover the amount of such tax, penalty and interest by an action at law or other appropriate judicial proceedings. The collection of such tax, penalty and interest shall not be a bar to any prosecution under sections 144.010 to 144.510."
[emphasis added]

Thus, we conclude that the legislature has not, by the enactment of Section 143.280, transformed the state income tax into a debt within the comprehension of Article I, Section 11, Constitution of Missouri, 1945.

The Supreme Court of Missouri has consistently held to the theory that there must be a clear conflict between a legislative enactment and a constitutional provision before it is warranted in declaring a statute unconstitutional. In re Burris (Mo.Sup. 1877) 66 Mo. 442; Hickey v. Board of Education of City of St. Louis (Mo.Sup. 1953) 256 S.W.2d 775. Additionally, the Supreme Court of Missouri has held that an attack upon the constitutionality of a statute will not be sustained if there is any reasonable theory upon which its constitutionality may be upheld, and if it is susceptible of two constructions, one making it valid and the other invalid, construction sustaining validity will be adopted. State on inf. Dalton v. Metropolitan St. Louis Sewer District (Mo. Sup. en banc 1955) 275 S.W.2d 225; and Brown v. Morris (Mo.Sup. en banc 1956) 290 S.W.2d 160.

Applying the foregoing principles, we find that Section 143.330(4), is susceptible of interpretation upholding validity, and therefore, it is the conclusion of this office, that Section 143.330, does not contravene Article I, Section 11, Constitution of Missouri, 1945.

CONCLUSION

It is therefore the conclusion of this office that a taxpayer who refuses to pay Missouri state income tax can be prosecuted for a misdemeanor pursuant to Section 143.330(4), RSMo 1969.

Honorable Joseph P. Teasdale

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Kenneth Romines.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

PROBATION AND
PAROLE:

Under Section 549.071, RSMo 1969, the duration of an extension of the term of probation is not limited by the original probation period so long as the total term is within the period of five years for felony cases and two years for misdemeanor cases.

OPINION NO. 19

February 22, 1971



Mr. W. G. Sartorious, Chairman
Missouri Board of Probation and
Parole
211 Marshall Street
Jefferson City, Missouri 65101

Dear Mr. Sartorious:

This will acknowledge receipt of your request for an opinion from this office pertaining to Section 549.071, RSMo 1969, which states:

"1. When any person of previous good character is convicted of any crime and commitment to the state department of corrections or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose. The probation shall be for a specific term which shall be stipulated in the order of record. In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no

Mr. W. G. Sartorius

probation shall be granted for a term of longer than five years. In the case of a misdemeanor offense no probation shall be granted for a term of longer than two years. The court may extend the term of the probation, but no more than one extension of any probation may be ordered.

"2. The courts, subject to the restrictions herein provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed, will, if permitted to go at large, not again violate the law, parole the defendant upon such conditions as the court sees fit to impose."

Specifically, you question whether the court may extend the term of probation for a period of time longer than the time contained in the original order.

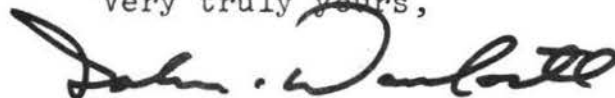
In our view, there is no limitation upon the time of the second probation except the prohibition which is contained in subsection 1 of Section 549.071, limiting the total term to five years for felony cases and to two years for misdemeanor cases. Even though such statutes are frequently strictly construed, there is nothing to indicate that the legislature intended the period of the extended term to be limited by the first.

CONCLUSION

It is the opinion of this office that under Section 549.071, RSMo 1969, the duration of an extension of the term of probation is not limited by the original probation period so long as the total term is within the period of five years for felony cases and two years for misdemeanor cases.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
COMMITTEEMEN:

Section 111.171, RSMo 1969, prohibits the secretary or treasurer of a county committee, whether a member of the committee or not, from serving as an election judge or clerk in elections in which the county is involved.

OPINION NO. 20

January 22, 1971

Honorable Stephen Burns
State Representative
District No. 42
10702 Manchester
St. Louis, Missouri 63122



Dear Representative Burns:

This official opinion is in response to your request for a ruling on the question of whether Section 111.171, RSMo 1969, prohibits the secretary or treasurer of a county committee who is not a member of the committee from serving as an election judge or clerk. You state that the secretary and treasurer of a Jefferson County political committee are selected by the elected members of the committee in order to broaden the representation of the "grass roots of the party." The Jefferson County clerk refuses to permit the secretary or treasurer of the committee to serve as an election judge or clerk relying on Section 111.171 and Attorney General's Opinion No. 237, dated April 3, 1970, to Honorable Ted Salveter.

The organization of a party political committee in Jefferson County (being a county with more than one legislative district) is governed by Sections 120.800 and 120.810, RSMo 1969. Pursuant to those provisions, a county committee shall elect a secretary and a treasurer "who may or may not be members of the committee." You have advised that the secretary and treasurer of this committee are not members of the committee.

Subsection 1 of Section 111.171, RSMo 1969, reads as follows:

"No person shall be qualified to act as judge or clerk of any registration or election in this state unless he is legally entitled to vote at the next election following his appointment. He must be a person of good repute and character who can speak, read and write the English language. He must reside in the precinct, ward, township or election district

Honorable Stephen Burns

for which he is selected to act. He must not hold any office or employment under the United States, the state of Missouri, or under the county, city, or other political subdivision involved in the election to be held at the time of his appointment. He must not be a candidate for any office at the next ensuing election but a notary public shall not be disqualified from acting as a judge or clerk."
[Emphasis supplied]

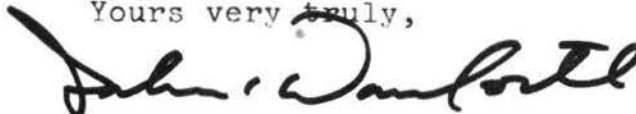
We find no requirement in Section 111.171 that only members of a county committee are prohibited from serving as election judges and clerks. A person is not qualified to act as an election judge or clerk if he holds "any office or employment" under the political subdivision involved in the election. In Opinion No. 237, dated April 3, 1970, to Honorable Ted Salveter (a copy of which is enclosed herewith), we concluded that members of a county committee are not qualified to serve as election judges and clerks because they are "public officers" or "county officers." We believe that the secretary and treasurer of a county committee elected by the members of the committee pursuant to Sections 120.800 and 120.810, RSMo 1969, hold an office under the county and are, therefore, prohibited by Section 111.171 from serving as election judges and clerks in elections in which the county is involved.

CONCLUSION

It is the opinion of this office that Section 111.171, RSMo 1969, prohibits the secretary or treasurer of a county committee, whether a member of the committee or not, from serving as an election judge or clerk in elections in which the county is involved.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 237
4-3-70, Salveter

Answered by Letter - Jones
OPINION LETTER NO. 22

April 26, 1971



Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This letter is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"Advice is requested as to the determination of the amount of benefits due a member of the Retirement System who has ceased to be an employee of the State of Missouri sometime prior to his Normal Retirement Date. We are referring to a member at least sixty years of age who has accumulated fifteen or more years of creditable service or who has served six or more years as a member of the General Assembly, and in either case, has not been refunded his accumulated contributions to the Fund.

* * *

"Our question is: Shall the amount of benefits be determinable at the time

Mr. Edwin M. Bode

the member ceases to be an employee, or
at the time he is eligible for benefits?"

The assumption is made that the opinion request refers to an individual who is not presently employed by the state; and who does not reenter state employment in the future.

In Attorney General's Opinion No. 188, Bode, 9-16-69, it was held that an individual who is sixty years of age, with fifteen years of creditable service in the state retirement system, but who has not retired and who is no longer a contributing member of the system, may not receive an increase in retirement benefits as provided for in House Bill No. 480 of the Seventy-fifth General Assembly, if such person does not reeneter state employment. (copy enclosed.) The reasoning of the opinion was in accordance with the decision in State ex rel Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (1962). In this case, it was held by the Supreme Court of Missouri, sitting en banc, that a 1961 amendment to a 1957 statute permitting payment of increased benefits to retired members (emphasis ours) of the Missouri State Employees' Retirement System would take a portion of the fund existing when the amendment was passed to pay the increase and would impair a contract with active members in violation of Section 13, Article I, of the Missouri Constitution.

It is submitted that the same consideration is applicable to the matter that has been presented. In line with the reasoning in the Breshears case, an individual who is not presently employed by the state; and who does not make contributions to the System, would not be entitled to increased benefits upon being eligible for retirement, as this would necessarily involve taking a portion of the existing retirement fund to pay the additional benefits to individuals who are not presently employed by the state. Consequently, such action would constitute an impairment of contract in violation of Section 13, Article I, of the Missouri Constitution as to all active members who have since continued to contribute to the Retirement System.

It is therefore our opinion that the amount of retirement benefits due a member of the retirement system who has ceased to be an employee of the state, sometime prior to his normal retirement date, but is at least sixty years of age and who has accumulated fifteen or more years of creditable service or served

Mr. Edwin M. Bode

six or more years as a member of the general assembly, and has not been refunded his accumulated contributions to the fund; are determined under the law in effect at the time the member ceases to be an employee of the state.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 188
9-16-69, Bode

INSURANCE:

Subsection 3 of the Division of Insurance's Regulation 3.11, which defines "replacement of life insurance" is in compliance with Section 374.045(1), (3), RSMo 1969, because such regulation is reasonably related to Section 375.936(5), RSMo 1969.

OPINION NO. 23

May 5, 1971



Honorable Eric F. Fink
State Representative
Forty-sixth District
Room 202B, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Fink:

This official opinion is issued in response to your request concerning the following:

"[W]heter or not Sec. 3 of this regulation [Regulation 3.11] is in compliance with paragraph 374.045, RSMo, subsection 1, Subdivision 3."

The specific language involved in this regulation is as follows:

"Section 3. Replacement of Life Insurance Defined

"The replacement of life insurance which, as used in this Regulation includes annuity contracts, is defined as any transaction, not exempted in Section 4, below,

"(A) Wherein new life insurance is to be purchased and it is known to the agent that, as part of the transaction, existing life insurance has been or is to be;

"(B) Or it is known to the agent that, as part of the transaction, existing life insurance has been or is to be:

"1) Lapsed or surrendered;

"2) Converted into paid-up insurance, continued as extended term insurance or under another form of non-forfeiture benefit;

"3) Converted otherwise so as to effect a reduction either in the amount of the existing life insurance or in the period of time the existing life insurance will continue in force;

"4) Reissued with a reduction in amount such that substantial cash values are released. ('Substantial cash values' include all transactions wherein an amount in excess of 50% of the tabular cash value is to be released on one or more of the existing policies.), or

"5) Assigned as collateral for a loan or subjected to substantial borrowing of the loan values whether in a single loan or under a schedule of borrowing over a period of time. 'Substantial borrowings' includes all transactions wherein an amount in excess of 50% of the tabular cash value is to be borrowed on one or more existing policies."

Section 2 of Regulation 3.11 states:

"Section 2. Purpose

"The purpose of this Regulation is:

"1) To implement the Insurance Laws of Missouri by regulating the acts and practices of insurers and agents with respect to life insurance replacing life insurance.

"2) To protect the interests of the life insurance public by establishing minimum standards of conduct to be observed in the replacement of proposed replacement of life insurance policies; by making available full and clear information on which an applicant for life insurance can make a decision in his own

Honorable Eric F. Fink

best interest; by reducing the opportunity for misrepresentation and incomplete comparison in replacement situations; and by precluding unfair methods of competition and unfair practices."

Section 374.045, RSMo 1969, authorizes the Superintendent of Insurance to make rules and regulations. Section 374.045(1) states:

"1. The superintendent shall have the full power and authority to make all reasonable rules and regulations to accomplish the following purposes:

"(3) To effectuate or aid in the interpretation of any law of this state pertaining to the business of insurance.
. . ."

The regulation mentioned in your request defines replacement of life insurance. The authority of the Division of Insurance to promulgate such a regulation comes from Section 374.045, RSMo quoted above. The validity of this regulation must be ascertained relative to both provisions of the general law governing administrative regulations and the statutory provision enacted by the legislature creating and detailing the duties and powers of the Division of Insurance. As the court said in the case of Senter v. Colarelli, 145 F.Supp. 569 (U.S.D.C.E.D. Mo. 1956):

"It is a familiar principle, both of common sense and of statutory construction, that a catch-all phrase of this sort [providing that an administrative office may issue reasonable regulations] must be read in the context of the general purpose of the statute, . . ." Id. at 576.

Section 375.936, RSMo 1969, defines unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. Subsection 5 of this section defines "misrepresentations and false advertising of policy contracts." It states as follows:

"'Misrepresentations and false advertising of policy contracts', making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or

statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statements as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in a company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance; . . ."

Clearly, the Division of Insurance enacted Regulation 3.11 subsection 3 to eliminate potentially unfair practices. The Division, itself, states this in subsection 2(2) of this regulation as quoted above.

The questioned regulation meets all the general standards prescribed for valid regulations. These standards are set out, in part, in 73 C.J.S. Public Administrative Bodies and Procedure, §94 as follows:

". . . A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules

Honorable Eric F. Fink

and regulations, amend, alter, enlarge,
or limit the terms of a legislative
enactment."

CONCLUSION

Thus, it is the opinion of this office that Subsection 3
of the Division of Insurance's Regulation 3.11, which defines
"replacement of life insurance" is in compliance with Section
374.045(1), (3), RSMo 1969, because such regulation is reason-
ably related to Section 375.936(5), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

October 14, 1971

OPINION LETTER NO. 28
Answer by Letter - Park

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri 64856



Dear Mr. Paul:

This letter is written in response to your request for an opinion concerning refund of fees erroneously collected by the county recorder of deeds in connection with recording of deeds of trust.

There is no statute which expressly authorizes the refund of fees erroneously collected by recorders of deeds and we are not aware of any procedure which may be used to accomplish this. Under these circumstances the fees in question cannot be refunded. It is fundamental that no officer in this state can pay out the money of the state except pursuant to statutory authority authorizing and warranting such payment. See *State ex rel. Bybee v. Hackmann*, 276 Mo. 110, 116 (1918); *Walker v. Linn County*, 72 Mo. 650 (1880); *State ex rel. Kresge Co. v. Howard*, 208 S.W.2d 247 (1947).

Very truly yours,

JOHN C. DANFORTH
Attorney General

February 5, 1971

Answered by Letter - Klaffenbach
OPINION LETTER NO. 29



Honorable Richard M. Webster
State Senator
Thirty-second District
Room 429, State Capitol
Jefferson City, Missouri 65101

Dear Senator Webster:

This letter is in response to your opinion request in which you inquire concerning the authority of the City Council of the City of Carthage to enact ordinances regulating the travel expense of the members of the Board of Public Works of that city.

We understand that the board operates an electric utility which provides electric power for the city and also operates the water system and as a part of the water system the sewage disposal operation.

Sections 91.450, RSMo 1969, et seq., provide for the organization and authority of the board of public works of third class cities such as Carthage.

We call to your attention that Section 91.510, RSMo 1969, expressly provides:

"All bills of such board and all salaries of its employees shall be allowed and paid in the same manner that bills and salaries of other officers and employees of such city are allowed and paid."

Honorable Richard M. Webster

We find no judicial interpretation of the above section, however, we believe that the language and the legislative intent is clear. Under Section 77.260, RSMo 1969, the mayor and the council have the duty and authority to have the care, management and control of the city and its finances and the power to enact and ordain ordinances not repugnant to the constitution and the laws of the state.

We have stated in other opinions of this office, not otherwise pertinent here, that the Board of Public Works is obviously not the governing body of the city but is a board of limited powers. We conclude in this instance also that such a Board of Public Works has only the authority which is expressly given to it by statute or is necessarily implied.

In direct answer to your question concerning the city's authority to regulate the expenses incurred by the individual members of the board, it is our view that the city does have such authority.

Very truly yours,

JOHN C. DANFORTH
Attorney General

October 6, 1971

OPINION LETTER NO. 30
Answer by letter-Wood

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in response to your request for my formal opinion on whether or not the Missouri State Park Board would be obligated to honor a fee contract entered into between the former trustees of the Jacob L. Babler Perpetual Endowment Trust Fund and Mr. W. Kendall Baker, Attorney at Law, of Houston, Texas. The subject of the contract was representation of the trust fund in settlement negotiations with the Mexican Government arising out of the expropriation in 1938 by the Mexican Government of certain interests in Mexican oil leases held by Jacob L. Babler. We understand that the trustees agreed to compensate Mr. Baker on the basis of thirty percent of any sum realized out of these negotiations with the Mexican Government.

Jacob L. Babler established the Perpetual Endowment Trust Fund through an instrument dated May 28, 1937 and recorded on June 24, 1937 at Book 1438, page 572 with the St. Louis County recorder of deeds. The assets of the fund were to be any and all income realized from the Mexican oil leases, and were to be devoted to the operation, maintenance and development of the Dr. Edmund A. Babler Memorial State Park. The trustees were given the option, in the event of insufficiency of the income of the fund for the stated purposes, of terminating the trust and relinquishing their rights and powers thereunder to the State of Missouri.

Jacob Babler's will, executed on July 17, 1942, and duly admitted for probate after his death on May 31, 1945, established a Testamentary Trust for the benefit of the Babler Memorial State Park.

Mr. Joseph Jaeger, Jr.

This Testamentary Trust was composed of the residue of his estate and had a duration of twenty years from the date of his death. The Testamentary Trust and the Perpetual Endowment Trust, though having a common purpose, were separately administered and separately funded. Because of the governmental expropriation of Jacob Babler's interest in the Mexican lands, the Perpetual Endowment trustees were solely dependent upon the assets of the Testamentary Trust for development and operation of the Park (see dissenting opinion in *Mercantile Trust Company National Ass'n v. Jaeger*, 457 S.W.2d 727, 740-741 (Mo. banc 1970)). We understand that the Perpetual Endowment trustees, upon termination of the Testamentary Trust and distribution of its assets to the State of Missouri in 1965 as provided in the will, have since that time entirely surrendered their management of the Park to the Missouri State Park Board. We accordingly believe that the Perpetual Endowment Trust has been effectually terminated and that the Missouri State Park Board has succeeded to all rights and obligation formerly held by said Trust.

A contingent fee contract for legal services may be canceled before the contingency occurs subject to payment of a reasonable attorney's fee for services already performed.

"There can be no doubt of the right of a client to discharge his lawyer, whether he be employed on a quantum meruit basis or for a contingent fee. In such event, if the lawyer has a contingent contract and is without fault, he has the election to claim a reasonable fee for the work done, as upon a mutual rescission, or to wait until the claim is liquidated by judgment or settlement and then sue (if necessary) for his contract fee. . . ." (In re Downs, 363 S.W.2d 679, 686 (Mo. banc 1963))

The Attorney General has the statutory responsibility of providing legal advice and representation to the State Park Board (Sections 27.040 and 27.060, RSMo 1969). This responsibility is general and unlimited; and therefore, we are of the opinion that this office should decide whether the instant contract for legal services "inherited" by the Park Board should be ratified or canceled. We believe it would be in the State's best interest not to disturb the present arrangement with Mr. Baker.

Yours very truly,

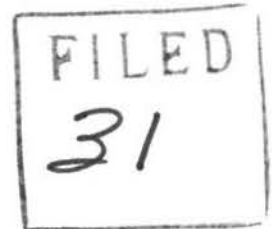
JOHN C. DANFORTH
Attorney General

TAXATION (SALES AND USE): The sale by Old Warson Country Club of tickets for admission to the Ryder Cup Golf Tournament is an isolated or occasional sale not subject to Missouri Sales Tax because the tournament is the first ever held by the club to which admission is charged and no future tournaments of this kind are planned or expected to be held.

May 5, 1971

OPINION NO. 31

Honorable Stephen Burns
Representative, District 42
10702 Manchester
St. Louis, Missouri 63122



Dear Mr. Burns:

This official opinion is issued in response to your request for a ruling as to whether sale of tickets for admission to the Ryder Cup Golf Tournament to be held at Old Warson Country Club are subject to Missouri State Sales Tax.

The pertinent facts as presented in your letter with enclosures may be stated as follows:

The Old Warson Country Club is a not-for-profit social club which will be host to the Ryder Cup Golf Tournament in September, 1971. Tickets will be sold to finance the tournament. It is not possible to determine that all expenses can be met from the proceeds of sale of tickets but hopefully the proceeds will pay such expense with enough left over to offset damage and wear and tear to the golf course and clubhouse. Most of the arrangements and work will be done on a voluntary basis, without compensation, by club members in the St. Louis area. The club has never held a tournament of this character before and it is expected that no such tournament will be held again in the foreseeable future.

The question is whether or not a Missouri Sales Tax is imposed upon the sale of admission tickets to this tournament.

Section 144.020, RSMo 1969, imposes a tax on all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.

Section 144.010(8) defines "sale at retail" to mean any transfer made by any person engaged in business as defined therein, including "(a) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events;".

It is clear that to be taxable the statute requires that a person (1) be engaged in business, and (2) make a sale at retail. The law defines "sale at retail" to include sales of admission tickets to athletic events. Accordingly, the sale of admission tickets under the circumstances outlined in your letter would be taxable if the seller is engaged in business as defined in Section 144.010(2), RSMo 1969. This section provides as follows:

"'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.510. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of sections 144.010 to 144.510." (Emphasis supplied)

The facts indicate that this is the first tournament of this character held by the country club and no future tournaments are planned or expected to be held. The Old Warson Country Club is neither organized nor operated for the purpose of holding golf tournaments, but rather for providing golf and other recreational facilities for its members as a private country club. The fact it holds a golf tournament of the Ryder Cup type is in itself something out of the ordinary and beyond the usual course of conduct of such a club. It is our view that the sale of tickets for admission to the golf tournament under the circumstances outlined in this letter is not subject to the Missouri Sales Tax for the reason that it is an isolated or occasional sale within the meaning of Section 144.010(2), RSMo 1969. The legislature had a purpose in inserting the language contained in this section of the statute and to say that a single transaction or sale by a person not engaged in the business of holding golf tournaments is not an isolated or occasional sale is to ignore the statutory language and render it meaningless.

In Glass-Tite Industries, Inc., v. State Board of Equalization, (App.) 72 Cal.Rptr.244,248, it was held that a single sale of a company's equipment was not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit, and accordingly it was an "occasional sale" within the meaning of the sales tax statute of California and not taxable.

In Commonwealth ex rel. Luckett v. Revday Indus., Inc., Ky., 432 S.W.2d 819,820, it was held that the sale of manufacturing equipment by a company engaged in manufacturing a product and selling it at retail

Honorable Stephen Burns

was not a sale of property held or used in the course of its selling activity, and was exempt from state sales tax as an "occasional sale."

In Ersted v. Hobart Howry Co., 299 N.W.66, 68 S.D.111, it was held that where there is a single transaction involving the sale of securities, it constitutes an isolated sale and is exempt from the provisions of the Blue Sky Law of South Dakota. To the same effect see Tarsia v. Nick's Laundry & Linen Supply Co., 300 P.2d 28,30, 239 Ore. 562; Nelson v. State (Okla.Cr.) 355 P.2d 413.

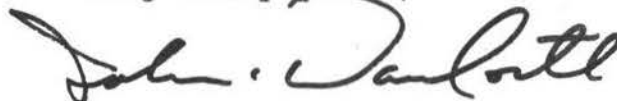
Rule No. 49 of the rules and regulations issued by the Department of Revenue, with respect to Missouri Sales Tax, does not and could not contain any provision which renders an isolated or occasional sale of this type taxable, in view of the statutory language to which reference is made above.

CONCLUSION

It is the opinion of this office that the sale by Old Warson Country Club of tickets for admission to the Ryder Cup Golf Tournament is an isolated or occasional sale not subject to Missouri Sales Tax because the tournament is the first ever held by the club to which admission is charged and no future tournaments of this kind are planned or expected to be held.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TAXATION (EXEMPTION):

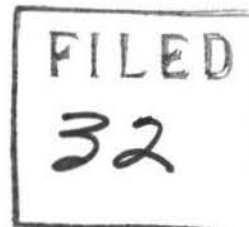
Tangible personal property leased
to a school district at a profit
is not exempt from taxation under

Article X, Section 6, Missouri Constitution, or under Section 137.100, RSMo 1969. Furthermore, a school district may agree, as part of the total yearly lease payment, to pay the amount of any taxes levied on the tangible personal property leased to the school district.

OPINION NO. 32

August 18, 1971

Honorable Ronald M. Belt
State Representative
District No. 96
108 Vine
Macon, Missouri 63552



Dear Representative Belt:

This is in response to your request for an opinion from this office in regard to the following inquiry:

"The Shelby County CI Schools of Shelbyville, Missouri, leases typewriters from the Litton Business Systems, Inc. Under the terms of the lease it provides that 'any and all taxes that may apply hereto or be levied upon equipment leased hereunder, shall be the responsibility of the Lessee'. There are taxes levied by Shelby County upon the typewriters and Litton now seeks to collect the tax from the Shelby County CI Schools. If the School owned the typewriters, of course there would be no tax.

"I seek an opinion as to whether or not under a lease provision whereby the Lessee is to pay the taxes a school district then becomes obligated to pay personal property taxes."

As further background for this opinion request, you enclosed a copy of an "Equipment Lease Agreement" between Litton Business Systems, Inc., Royal Typewriter Division, Lessor, and Shelby County C-1 Schools, Lessee. Basically, the agreement provides for the leasing of thirty typewriter units for sixty months with annual lease payments. Two of the terms and conditions of this agreement are of particular interest:

Honorable Ronald M. Belt

"1. TAXES: Any and all taxes which may apply hereto or be levied upon equipment leased hereunder, shall be the responsibility of the Lessee.

* * *

"3. TITLE: Title to the equipment leased hereunder shall at all times remain in the Lessor and Lessee agrees and covenants not to hold itself out at any time as having title to the equipment."

In addition to the agreement, you enclose a copy of an invoice from Litton Industries Credit Corporation, a Division of Litton Industries, to the Shelby County C-1 Schools in the amount of \$67.29 for "Shelby County Personal Property Tax 1969." It will be assumed in writing this opinion that the personal property taxes were levied against Litton Industries and that the invoice enclosed with your letter is the method by which Litton Industries seeks reimbursement for the taxes levied on the subject typewriters. We understand your inquiry to be whether the Shelby County C-1 School District is obligated to pay the invoice as submitted by Litton Industries Credit Corporation.

Tangible personal property is defined as follows in Section 137.010(3), RSMo 1969, for the purpose of the laws governing taxation in the State of Missouri:

"(3) 'Tangible personal property' includes every tangible thing being the subject of ownership or part ownership whether animate or inanimate, other than money, and not forming part or parcel of real property as herein defined."

The owner of tangible personal property is responsible for the tangible personal property tax. See Sections 137.090 and 137.095, RSMo 1969. Under the lease agreement, particularly paragraph 3 of the terms and conditions, the owner of the leased equipment is the lessor, Litton Business Systems, and, therefore, Litton would be responsible for the personal property taxes levied on these typewriters.

However, certain tangible personal property is exempt from taxation pursuant to Article X, Section 6 of the Missouri Constitution:

"Exemptions from taxation. All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries,

Honorable Ronald M. Belt

shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."
[Emphasis supplied]

This section of the Missouri Constitution is implemented by Section 137.100, RSMo 1969, which reads in part as follows:

"Certain property exempt from taxes.--The following subjects are exempt from taxation for state, county or local purposes:

(1) Lands and other property belonging to this state;

(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments, and on public squares and lots kept open for health, use or ornament;

* * *

(5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

Section 6 of Article X and Section 137.100 contemplate two separate kinds of personal property which is exempt from taxation. The first is based on ownership--"property of" or "belonging to" the enumerated governmental entities plus nonprofit cemeteries. The second depends on the use to which the property is put--property not

Honorable Ronald M. Belt

held for private or corporate profit and "used exclusively" for religious, educational, or charitable purposes. The Missouri Supreme Court in School Dist. of Berkeley v. Evans, 250 S.W.2d 499, 500 (Mo. 1952) called attention to the two tests to be applied in determining whether property is exempt from taxation:

"It will be noted that the section of the Constitution provides that all property of the state and other political subdivisions shall be exempt from taxation. . . . The test to be applied to property held by the state and its political subdivisions is ownership while the test as to other exemptions which may be granted by general law is whether the property is being used for the purposes enumerated. . . ."

[Emphasis in original]

Are these typewriters owned by a political subdivision of the state? Previously, we have called attention to the lease agreement, particularly paragraph 3 of the terms and conditions, under which Litton, not the school district, is the owner of this equipment. Therefore, the property is not exempt from taxation under the "ownership" test.

The second kind of personal property exempt from taxation is "all property, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable." Under this exemption the use of the property rather than ownership is the sole consideration in determining whether it is exempt from taxation.

When privately owned property is leased to a school and used by the school exclusively for school purposes, is the "use" of the property that of the lessor and owner, or is it that of the lessee who uses it for exempt purposes? Based on Attorney General's Opinion No. 31, June 8, 1967, to Honorable Bill D. Burlison (a copy of which is enclosed) and particularly the decision of the Missouri Supreme Court in State ex rel. Hammer v. Macgurn, 187 Mo. 238, 86 S.W. 138 (1905) quoted at length in that opinion, we conclude that the "use" of the property is that of the lessor when the property is leased for a profit. In the instant case we must assume that Litton Business Systems is leasing the typewriters for a profit and, therefore, these typewriters would not be exempt from taxation because of their use by the school district.

The agreement in question obligates the Shelby County C-1 School District to pay a certain amount for the lease of these typewriters. Part of the total lease payment is the amount of any taxes which are levied against the lessor's property. The amount

Honorable Ronald M. Belt

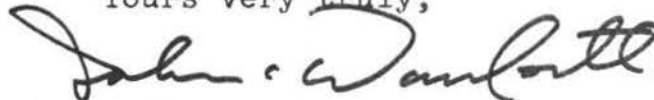
of tax levied against such typewriters is ascertainable from public records at the time the obligation is payable by the school district. Litton Business Systems, the lessor, has no control over the amount of taxes levied on these typewriters. Consequently, we do not believe this agreement conflicts with Section 432.070, RSMo 1969. Therefore, the invoice from the lessor to the Shelby County C-1 School District, which is the subject of your inquiry, should be interpreted as part of the Shelby County C-1 School District's contractual obligation under the equipment lease agreement. We are aware of no provision in the law which prevents a school district of the State of Missouri from contracting to pay, as part of its total obligation under a lease, an amount of money equal to the amount paid by the lessor and owner of the equipment for taxes levied on the equipment leased to the school district.

CONCLUSION

It is the conclusion of this office that tangible personal property leased to a school district at a profit is not exempt from taxation under Article X, Section 6, Missouri Constitution, or under Section 137.100, RSMo 1969. Furthermore, a school district may agree, as part of the total yearly lease payment, to pay the amount of any taxes levied on the tangible personal property leased to the school district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

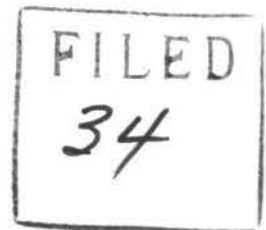


JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 31
6-8-67, Burlison

May 12, 1971

Answered by Letter - Nowotny
OPINION LETTER NO. 34



Mr. Harvey D. Shell, P.E.
Acting Executive Secretary
Air Conservation Commission
State of Missouri
P. O. Box 1062
Jefferson City, Missouri 65101

Dear Mr. Shell:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"On August 14-16, 1970, the 1970 Governor's Youth Conference on Environmental Quality was held at the University of Missouri in Columbia. There were 270 delegates from 13 youth organizations, representing some 600,000 young Missouri citizens.

"The program was primarily educational in nature, and both Mr. Walter Nowotny, of your office, and myself participated. The delegates were enthusiastic, and the conference was a complete success.

"One of the conference recommendations was that it be an annual affair, and that the State of Missouri provide financial help. This, of course, would require an appropriation from the Legislature, and a constitutional question would probably be raised.

Mr. Harvey D. Shell

"Could a direct appropriation by the Legislature be legally made to the group? If such cannot, could the Missouri Air Conservation Commission contract such a conference through the contractual services portion of its operations budget?"

The first question is whether the legislature could appropriate money directly to the conference. First, we note that there are no statutes specifically authorizing or providing for this conference. Nor does the conference have the status of a state agency or political subdivision.

Such a conference is not public but is private in the sense that it is promoted and handled by private persons or organizations. It is a governor's conference only to the extent that the governor is lending the title of the office to the conference.

Therefore, it is our opinion that Section 38(a), Article III, Constitution of Missouri, prohibits the legislature from appropriating state funds to the conference. This provision reads as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

We also direct your attention to State ex rel. Garth et al. v. Switzler, 143 Mo. 287, where it was held that a tax which was to provide for the endowment of free scholarships to the state university was a purely private and not a public purpose and thus in contravention of the constitution.

Furthermore, assuming that such a purpose was public and not private, there is, as noted above, no legislation providing for

Mr. Harvey D. Shell

such a conference. Therefore, the mere appropriation of money would not be sufficient, since legislation of a general character cannot be included in an appropriation bill. State ex rel. Gaines v. Canada, 342 Mo. 121; and State ex rel Davis v. Smith, 335 Mo. 1069.

Your second question is whether the Missouri Air Conservation Commission could contract for such a conference.

In this regard, there is legislation of a public nature by which contracts for services may be made. The Commission has, among others, the following powers to implement the "Missouri Air Conservation Law", Chapter 203, RSMo (Section 203.050, RSMo 1969):

"1. In addition to any other powers vested in it by law the commission shall have the following powers:

* * *

"(9) Retain, employ, provide for, and compensate, within appropriations available therefor, such consultants, assistants, deputies, clerks, and other employees on a full or part-time basis as may be necessary to carry out the provisions of this chapter and prescribe the times at which they shall be appointed and their powers and duties, and

"(10) Secure necessary scientific, technical, administrative and operational services, including laboratory facilities, by contract or otherwise with any educational institution, experiment station, or any board, department, or other agency of any political subdivision or state or the federal government."

Thus, to implement and carry out the duties imposed by Chapter 203, the Commission has the power to retain or employ such personnel or contract for such services as necessary.

Since the conference is not an "educational institution, experiment station, or any board, department, or other agency of any political subdivision or state of the federal government", it is our opinion that the Commission could not contract with the conference for any purpose pursuant to Section 203.050.1(10).

However, it is our opinion that under Section 203.050.1(9) the Commission could retain the conference and participants of the

Mr. Harvey D. Shell

conference as consultants, if the conference is undertaking programs or activities which conform to the purposes of Chapter 203. A consultant is defined as:

"1: One who consults another 2: one who gives professional advice or services regarding matters in the field of his special knowledge or training, as a consulting physician or engineer, or, sometimes, a detective." Webster's New International Dictionary, Second Edition.

It is necessary to add that such consultants are not employees in the same sense as the regular members of your staff, and, for example, would not come under the merit system law.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SOCIAL SECURITY:
COUNTY COLLECTOR:

1. The county is liable to make res-
titution to the collector of revenue
for personal funds of the collector

used to pay the county's obligation under the Social Security Law.

2. An action to recover money paid by collector of revenue for the
county in connection with employers' contributions under the Social
Security Act must be maintained within five years.

OPINION NO. 35

October 19, 1971

Honorable John R. Sims
Prosecuting Attorney
Newton County
2nd Floor Courthouse
Neosho, Missouri 64850



Dear Mr. Sims:

This official opinion is rendered pursuant to the request con-
tained in your letter concerning reimbursement of the collector of
revenue of Newton County for social security taxes paid with per-
sonal funds.

More specifically, the questions raised are as follows:

1. "Is the County liable to the Collector of
Revenue for the payments he has made from
his personal funds for social security and
which should have been paid by the County,
and should the County reimburse him for the
amounts he has paid?"
2. "Also, what is the limitation on any action
he would have if the County is liable to
reimburse him?"

The facts are that Newton County, as a political subdivision,
entered into an agreement with the State of Missouri July 18, 1951,
as authorized by law, whereby the benefits of the system of Federal
Old-Age and Survivors Insurance were extended to all its eligible
employees and officials and undertook thereby to pay into the Con-
tributions Fund, created by the Social Security Law, contributions
with respect to wages paid to such employees and officials. Pursuant
to this agreement, the said county has been making payments to the
appropriate state agency for the Contributions Fund.

In the case of the county collector of revenue and eligible
employees of his office, the collector has followed the practice

Honorable John R. Sims

of drawing checks on his personal bank account in amounts sufficient to cover the required contributions, which checks are delivered to the county clerk who transmits them to the state agency along with county funds being used to pay contributions with respect to wages paid other county employees and officials. The county's employer identification number was used in transmitting these funds.

As indicated in your letter, this office on April 29, 1970, issued Opinion No. 288 wherein it was concluded as follows:

"The county is liable for payment of the tax on wages paid by the county to its Collector, his deputy and clerical employees, without limitation except as contained in the Social Security Act. Payment by the Collector of wages to deputy and clerical personnel from the amount the Collector is authorized to retain for deputy and clerical hire under Section 52.280, House Bill No. 399, 75th General Assembly, is payment by the county insofar as social security is concerned."

We believe the views expressed in Opinion No. 288 are applicable to the present matter in concluding that Newton County, rather than the collector of Newton County in his individual capacity, should have paid contributions on wages of the collector and employees of his office.

Although there is no statute which expressly authorizes the restitution of this money, it is our view that the doctrine announced by the Supreme Court of Missouri in Ewing v. Vernon County, 216 Mo. 681 (1909) and followed thereafter, is applicable to this case. The doctrine is, that where a public official in performing a duty enjoined on him by statute, necessarily expends his own funds, there being no statutory provision for meeting these expenses out of the public treasury, he may be reimbursed for such expenses. See Miller v. Webster County, 228 S.W.2d 706 (Mo. 1950); Maxwell v. Andrew County, 146 S.W.2d 621 (Mo. 1940); Motley v. Pike County, 135 S.W. 40 (Mo. 1911), and cases cited therein.

Whether these decisions were based on construction of the particular statutes involved or a quasi-contractual right not based upon statute is not of importance in the present matter considering the statutory authority for counties to enter into agreements for payment of contributions under the Federal Old-Age and Survivors Insurance System (Section 105.350, RSMo 1969) and considering further the fact that Newton County is party to such an agreement. The obligation to pay the employers' share of the Social Security taxes is

Honorable John R. Sims

clearly that of the county, and the expense is one necessarily incurred in operation of the collector's office. If the collector, in default of the county, pays this expense, he is entitled to reimbursement.

With reference to the second question presented by your request, it is our opinion that Section 516.120, RSMo 1969, relating to the five year statute of limitations would apply inasmuch as the action would be upon an implied obligation or liability of the county to reimburse the collector of revenue.

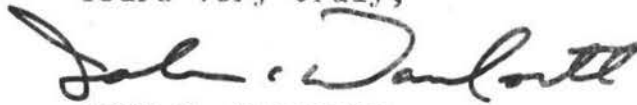
CONCLUSION

It is, therefore, the opinion of this office that:

1. The county is liable to make restitution to the collector of revenue for personal funds of the collector used to pay the county's obligation under the Social Security Law.
2. An action to recover money paid by collector of revenue for the county in connection with employers' contributions under the Social Security Act must be maintained within five years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

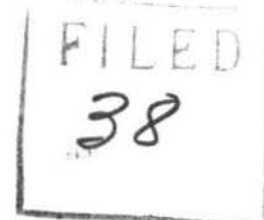
JOHN C. DANFORTH
Attorney General

Answer by letter-Burns

January 27, 1971

OPINION LETTER NO. 38

Honorable Harold L. Volkmer
Representative, District 100
Room 407, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Volkmer:

This is in answer to your request in which you asked whether a person who acts as an election judge or clerk must live in the precinct in which he acts as judge or clerk.

You specifically inquire whether a person can act as an election judge or clerk in a precinct within a township when such person resides in the township but not in the precinct.

Section 111.171, RSMo 1969, provides in part as follows:

"1. No person shall be qualified to act as judge or clerk of any registration or election in this state unless he is legally entitled to vote at the next election following his appointment. He must be a person of good repute and character who can speak, read and write the English language. He must reside in the precinct, ward, township or election district for which he is elected to act. . . ."

It is clear that the person selected to be an election judge or clerk must reside in the election district for which he is to act.

Of course, a township or a ward may be an election district, but when there is a precinct within a township or within a ward, the election officials of such precinct are acting for the precinct itself as an election unit rather than for the township or ward within which the precinct is located. The precinct in such case is the

Honorable Harold L. Volkmer

election district in which the election is being held and for which the election officials are acting.

It is, therefore, our view that a person who lives within a township but who does not live in a precinct within such township cannot serve as an election judge or clerk in such precinct.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Mansur

January 14, 1971

OPINION LETTER NO. 43

Honorable John E. Parrish
Prosecuting Attorney
Camden County Court House
Camdenton, Missouri 65020



Dear Mr. Parrish:

This is in response to your request for an opinion from this office concerning the registration of motor vehicles under Chapter 301, RSMo. Your request in part is as follows:

"The water farming operation which is the subject of this request for an opinion is a specialized field of work which requires specialized equipment. Most of this equipment is mobile and I specifically request your answers to the two questions above to be directed to each particular item of equipment listed below:

1. Treatment trailers which are designed to transport one boat and one 55 gallon chemical drum. These trailers are custom built by the business operator and they are used for no other purpose than to transport the aforementioned items between the production fields in which the water acreage is situate.
2. Two wheel seine trailers for transporting seines from one production unit to the other.
3. Air compressor on wheels used in the farming operation for drilling fence post holes, quarrying rock, etc.

Honorable John E. Parrish

4. Nest wagons which are two or four wheeled wagons on rubber tires used exclusively for transporting nests of eggs from one production unit to another.

5. Power sprayer unit on wheels used to spray cattle produced by the business enterprise in an ancillary livestock farming operation and to spray weeds and brush around the ponds within the production units, adjacent roads, etc.

"The only times when the above itemized equipment is towed or moved over any highway is when such equipment is required to be moved between production units bisected by the aforementioned State Highway and county road. When pick-up trucks are used to transport this equipment on these roadways (and this is the most usual means of transport) those trucks are validly licensed vehicles. Furthermore, it is a geographic impossibility to travel from one production unit of this business enterprise to another without traveling across either Missouri State Highway No. 7 or the aforementioned county road."

Section 301.010(28), RSMo, provides:

"'Trailer', any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semitrailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle;"

Section 301.010(30), RSMo, provides:

"'Vehicle', any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."

Honorable John E. Parrish

Section 301.020, RSMo, provides in part:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall annually file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose containing:"

The question to be decided is whether the mechanical equipment as described in your opinion request comes within the term "trailer" as used in Chapter 301, RSMo. Certainly, some of the equipment you describe would be classified as a trailer in common parlance. This is not sufficient, however, because the statute describes the type of trailer which has to be registered and such equipment must come within such description as used in the statute before it is required to be registered.

The statute defines a "trailer" as any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle. The statute defines a "vehicle" as any mechanical device on wheels designed primarily for use on highways. In order for a trailer to come within the provisions of this statute, it must be designed primarily for use on highways. According to the information you have given us, mechanical equipment under consideration was not designed primarily for use on highways and does not come within the provisions of Chapter 301, RSMo, and, therefore, is not required to be registered under Section 301.020, RSMo.

It is the opinion of this office that the mechanical equipment described in the above opinion request does not come within the definition of the word "trailer" as used in Chapter 301, RSMo, and need not be registered with the director of revenue as a trailer.

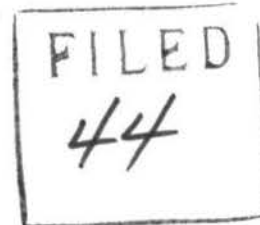
Yours very truly,

JOHN C. DANFORTH
Attorney General

May 11, 1971

Answer by letter-Wood

OPINION LETTER NO. 44



Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

You have requested my opinion as to what jurisdiction, if any, does the St. Louis County Planning and Zoning Commission have over the Dr. Edmund A. Babler Memorial State Park.

St. Louis County operates under a constitutional charter:

"Any county having more than 85,000 inhabitants, according to the census of the United States, may frame and adopt and amend a charter for its own government as provided in this article, and upon such adoption shall be a body corporate and politic." (Article VI, Sec. 18(a), Constitution of Missouri, 1945)

"The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; . . ." (Article VI, Sec. 18(c), Constitution of Missouri, 1945)

We understand that Babler Memorial State Park is situated in an unincorporated area of St. Louis County.

The St. Louis County Charter provides:

Mr. Joseph Jaeger, Jr.

"Pursuant to and in conformity with the constitution of Missouri and without limiting the generality of the powers vested in the council by this charter, the council shall have, by ordinance, the power to:

* * *

"(14) Exercise all powers and duties now or hereafter conferred upon counties, county courts, county governing bodies and county officers by the constitution, by law and by this charter and determine and make provision for any matter of county government not otherwise provided herein;

* * *

"(22) Exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities, and on such other subjects as may be authorized by the constitution or by law; . . ." (Article II, Sec. 2.180, Charter of St. Louis County, as amended, 1968)

"The director of planning shall exercise those powers and perform those duties with respect to planning and zoning required of him by ordinance." (Article IV, Sec. 4.250, ibid)

". . . The [planning] commission [within the department of planning] shall advise and make recommendations to the director and the council with respect to planning and zoning and shall perform such other duties as may be required by ordinance. . . ." (Article IV, Sec. 4.260, ibid)

The county council has by ordinance divided the unincorporated area of St. Louis County into various land use classifications and defined conditions and limitations appropriate to each classification (Sec. 1003.030, Revised Ordinances, St. Louis County, 1968). One of these land use classifications is the Park and Scenic District.

Mr. Joseph Jaeger, Jr.

"1. The 'PS' Park and Scenic District of St. Louis County encompasses land which has recreational, scenic and health value owned by public agencies or land in which public agencies have some lesser legal interest. . . ." (Section 1003.103, Revised Ordinances, St. Louis County, 1968)

We assume that all land owned now or in the future by the State of Missouri and controlled by the Missouri State Park Board in unincorporated St. Louis County as a part of Babler Memorial State Park would bear this Park and Scenic District classification.

The Park and Scenic District ordinance, above cited, provides for certain permitted land uses and developments, conditional land uses and developments, structural height and location limitations, parking space requirements, and sign regulations. We understand the core of your question to be whether or not these various limitations and requirements of the Park and Scenic District ordinance govern the State Park Board in its management and development of Babler Memorial State Park.

The Supreme Court has made the following observations on the nature of a county operating under a constitutional charter pursuant to Article VI, Section 18(c), Constitution of Missouri, 1945.

"Moreover, charter counties are endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities. They are empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such areas. Section 18(c) [Article VI, Constitution of Missouri, 1945] These are police powers ordinarily vested in municipal corporations. . . . A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. . . ." (State on inf. Dalton v. Gamble, 280 S.W.2d 656, 660 (Mo. banc 1955))

Mr. Joseph Jaeger, Jr.

In a later case, the Supreme Court ruled that a state statute setting forth procedures for re-zoning in first class counties did not apply to the St. Louis County Council and was superseded by the council's ordinance, inconsistent with the statute, passed pursuant to Article VI, Section 18(c) of the Missouri Constitution and the equivalent section of the St. Louis County Charter. In so ruling, the court commented:

" . . . It is true that zoning regulations are an exercise of the police power of the state and that the exercise of the police power is a governmental function, nevertheless a portion of the state's police power may be delegated, and it has been delegated to St. Louis County by Section 18(c) of Article VI of the Constitution of Missouri 1945. . . ."
(Casper v. Hetlage, 359 S.W.2d 781, 789 (Mo. 1962))

In St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. banc 1962), the Supreme Court upheld the authority of the county, in the exercise of its zoning power pursuant to the Constitution and Charter, to limit a municipality's right under state statutes to select through condemnation the site for a sewage disposal plant outside the limits of the city and in an unincorporated area of the county.

"Planning and zoning, as well as sewage disposal, is a governmental function referable to the police power. . . . The planning and zoning powers which are vested in charter counties directly by the Constitution are of similar character and in some respects such constitutional powers take precedence over the legislative grants. . . .

* * *

"Ordinarily, the grantee of the power of eminent domain may determine the location of the facility or improvement and the land to be taken for it, but the power of selecting a location may be restricted by statute or an ordinance having the force and effect of a statutory provision.
. . . .

"Contrary to the city's contention, the grant of municipal powers to charter counties under § 18 of Art. VI is meaningful and vests rights

Mr. Joseph Jaeger, Jr.

which cannot be taken away or impaired by the general assembly, one of which is to exercise legislative power pertaining to planning and zoning in the part of the county outside of incorporated cities. . . ." (St. Louis County v. City of Manchester, 360 S.W.2d 638, 640-641 (Mo. banc 1962))

Accordingly, we believe that the Charter of St. Louis County must be viewed as statutes for the county's government and subject to the usual rules of statutory construction.

"Local zoning ordinances are not applicable to public uses of property for which an agency of the government has the power to acquire lands by the exercise of the power of eminent domain. . . . The state and its agencies are not within the purview of a statute unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles or interest of the state would be divested or diminished. . . . 'Zoning restrictions cannot apply to the state or any of its agencies vested with the right of eminent domain in the use of land for public purposes.'" (State ex rel. Askew v. Kopp, 330 S.W.2d 882, 888-889 (Mo. 1960))

The St. Louis Court of Appeals has ruled that the State of Missouri, in erecting a clinic and administration building at the St. Louis State Hospital within the City of St. Louis, was not required to obtain a building permit from the city and in so doing commented:

"The issues herein distill into the question of whether the State has by legislation or by its contract with plaintiff empowered the City to impose the permit fee on plaintiff. We first inquire whether legislation thus empowered the City. On this, we turn to the well-established principle that an ordinance does not apply to a state with reference to its own property unless the charter expressly gives the city authority to bind the state or the state waives its right to regulate its property. (citations omitted) The state and its agencies are not within the purview of a statute unless an intention to include them is

Mr. Joseph Jaeger, Jr.

clearly manifested, especially where prerogatives, rights, titles, or interests of the state would be divested or diminished or liabilities imposed on it. . . ." (Paulus v. City of St. Louis, 446 S.W.2d 144, 150-151 (St.L.Ct.App. 1969))

The Charter of St. Louis County does not expressly give to the county any zoning authority over state owned land nor do we believe that it clearly manifests an intention to include state owned land within the scope of the county's zoning powers. Although we have some doubts that the charter could constitutionally make such express provisions (" . . . a charter for its own government . . . " (Emphasis added; Article VI, Sec. 18(a), Constitution of Missouri), we need not here decide that question. Therefore, absent any authority contained in the statutes of the state, we do not think that the lands of Babler State Park are subject to the control of the St. Louis County Zoning and Planning Commission.

The statutes authorize the Missouri State Park Board to acquire lands by purchase, gift or condemnation to be held and maintained for park purposes (Section 253.040, RSMo), to construct suitable public facilities on such land (Section 253.080, RSMo), and to accept the donation to the state of the Dr. Edmund A. Babler State Park in St. Louis County (Sections 253.350 and 253.360, RSMo).

We can find no express or inferential provision in the statutes pertaining to the state parks that the discretion therein vested in the State Park Board shall be subject to or limited in any way by local governments (compare, for example, Section 99.130, RSMo, which provides in part, "All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. . . .").

Accordingly, we are of the opinion that the St. Louis County Planning and Zoning Commission has no jurisdiction over the development of the Dr. Edmund A. Babler Memorial State Park.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Klaffenbach

January 21, 1971

OPINION LETTER NO. 47

Honorable Thomas A. Walsh
State Representative
District No. 52
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Walsh:

This letter is in response to your opinion request in which you ask concerning the validity of Section 5.160, House Bill No. 5, Third Extraordinary Session, 75th General Assembly, which provides:

"There is appropriated out of the State Treasury, chargeable to the fund and for the agency and purpose designated, for the period beginning July 1, 1970 and ending June 30, 1971, as follows:

* * *

"Section 5.160. To the Division of Mental Health

"For the Administration of the Division and for the operation of its various schools, hospitals, clinics, centers, institutes, projects and programs

"From General Revenue. \$71,685,300"

You question whether this appropriation is in violation of Section 21.260, RSMo 1969, which states in part:

"Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be

Honorable Thomas A. Walsh

made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. . . ."

Our research into the historical background of the above section which was first enacted in 1933 leads us to the conclusion that, while it is not crystal clear what meaning the legislature intended by the use of the term "departments" the legislature did intend to require at the least an itemization by governmental units no greater than departments. The legislature can, under the broad constitutional grant of legislative powers, provide separate itemization by lesser units such as divisions, subdivisions, boards and agencies.

Section 21.260 does not require separate itemization of operational items except as therein provided with respect to items of extraordinary operation and maintenance and for each major capital expenditure. While it is difficult to say precisely what constitutes extraordinary operation and maintenance expenditure, we conclude that the legislature in making this appropriation acted within the limitations of this provision and therefore presumably no such extraordinary expenditure is involved.

For the above reasons, we conclude that the lump sum appropriation in Section 5.160 of House Bill No. 5, Third Extraordinary Session, 75th General Assembly, does not violate the provisions of Section 21.260.

Yours very truly,

JOHN C. DANFORTH
Attorney General

BONDS:

COUNTY DUMP GROUNDS:

A third class county may levy taxes and issue bonds (but not revenue bonds) for the purposes of acquiring land and equipment and maintaining a county dumping ground. The levy may be over the maximum rate allowed by Section 137.065(1), RSMo 1969, if the provisions of Section 137.065(2), RSMo 1969, are complied with.

OPINION NO. 48

May 7, 1971

Honorable Peter H. Rea
Prosecuting Attorney
Taney County Court House
Forsyth, Missouri 65653

Dear Mr. Rea:

This is in response to your request for an opinion on the following questions:

"May Taney County, a county of the third class, who has accepted the terms of the local county option dumping law, vote a bond, either revenue or general obligation, or vote a levy for the purpose of acquiring land, equipment, and maintaining a county dump ground?

"May the City of Branson, a fourth class city in Taney County, Missouri, vote a general obligation bond, revenue bond, or increased tax levy for the purpose of paying a pro rata part of said amount needed to obtain the co-operative dump ground?

"If the answer to the second question is yes, would it also apply to Hollister, a fourth class city, Rockaway Beach, a village in Taney County, and Forsyth, a fourth class city?"

In answer to your first question, Section 64.490(1), RSMo 1969, provides:

"1. Any county of the second, third or fourth class may purchase or lease, maintain and operate a dumping grounds for the disposal of ashes, garbage, refuse and rubbish as defined

Honorable Peter H. Rea

in sections 64.460 to 64.487 and may agree or contract with any municipality within the county for the operation of a dumping grounds, as provided in chapter 70, RSMo."

Thus, it is proper for Taney County to operate a county dumping ground.

Article VI, Section 26 of the Constitution and Sections 108.010 and 108.020, RSMo 1969, permit a county to become indebted for county purposes, such as operating dumping grounds pursuant to Section 64.490(1) quoted above. Such indebtedness is evidenced by bonds issued by the county by virtue of Sections 108.060, et seq. However, we find no statutory provision authorizing a third class county to issue revenue bonds for the purpose of operating a dumping ground. Therefore, we are of the opinion that while a county may issue general obligation bonds for the purposes of acquiring land and equipment for a county dump and to maintain such a dump (such bonds to be retired by taxes levied by the county court sufficient to pay interest and to create a sinking fund for the payment of principal when the bonds become due, Section 108.070, RSMo 1969); Taney County may not issue revenue bonds for such purposes.

You also ask whether Taney County may vote a levy for the purposes of acquiring land and equipment and maintaining a county dumping ground. Taney County may levy taxes for county purposes generally at a rate within the limits set by law. See Article X, Section 11 and Section 137.065, RSMo 1969. As we have already indicated, acquiring land and equipment for the purpose of maintaining a county dump would be a county purpose, so quite clearly a portion of the county's tax levy could be used in such fashion.

The second paragraph of Section 137.065 provides:

"2. County courts are hereby authorized to call and conduct a special election under the laws governing such election for the purpose of increasing maximum tax rates herein specified, or to submit a proposition for the increase of such rates at any regular election, and shall submit any such proposition at either a special or regular election when petitioned therefor by not less than ten percent of the qualified voters of the county as determined by the total vote cast for governor in the last preceding general election for governor, and the proposition shall be as follows on the ballot: 'For a levy for county purposes

Honorable Peter H. Rea

of on the hundred dollars valuation'
and 'Against a levy for county purposes of
..... on the hundred dollars valuation.'"

Therefore, a dumping ground may be supported by an increased levy adopted by the voters in accordance with the above section.

You also inquire as to the power of fourth class cities within Taney County and the village of Rockaway Beach to vote bonds or increase the tax levy for the purposes of paying a pro rata part of the amount needed to operate a dumping ground in conjunction with the county.

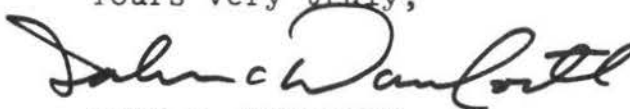
Section 27.040, RSMo 1969, provides that this office can render official opinions to the officers therein only as to their official duties. We believe the prosecuting attorney has no duty to advise cities and villages as to their authority to vote bonds or increase tax levies. We must, therefore, decline to answer your inquiry as to such municipalities.

CONCLUSION

It is the opinion of this office that a third class county may levy taxes and issue bonds (but not revenue bonds) for the purposes of acquiring land and equipment and maintaining a county dumping ground. The levy may be over the maximum rate allowed by Section 137.065(1), RSMo 1969, if the provisions of Section 137.065(2), RSMo 1969, are complied with.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

March 29, 1971

Answer by letter-Wood

OPINION LETTER NO. 50

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have requested my formal opinion as to the legality of a contract that would be entered into between the Missouri State Park Board and a private individual or private historic group or political subdivision, whereby, the Park Board would assume responsibility for continually maintaining, repairing, and administering a historic site designated as a recipient of federal funds by the Secretary of the Interior pursuant to Public Law 89-665 (80 Stat. 915, 16 U.S.C.A., §§470, et seq.) in the event the particular individual, historic group, or political subdivision failed to maintain, repair or administer the historic site as required by the Secretary of the Interior.

For the reasons developed in my opinion to you bearing No. 420 and dated October 28, 1969 (copy enclosed), it is my opinion that the Park Board may not enter into such a contract. In my opinion, the Park Board may only agree to maintain, repair, and administer historic sites owned or leased by the State of Missouri for "park purposes."

"The board is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands,

Mr. Joseph Jaeger, Jr.

sites, objects or facilities when such action would promote the park program and the general welfare. . . ." (Section 253.040(1), RSMo 1969)

We believe that a historic site is properly within the scope of the above statute in view of the law's definition of a "park" as:

". . . any land, site or object primarily of recreational value or of cultural value because of its scenic, historic, prehistoric, archeologic, scientific, or other distinctive characteristics or natural features;" (Section 253.010(3), RSMo 1969)

Accordingly, it is my opinion that the State Park Board may not contract with a private individual, historic group or political subdivision for the maintenance, repair, and administration of a historic site which is not owned or leased by the State of Missouri for park purposes.

Yours very truly,

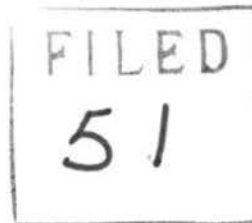
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 420
10-28-69, Jaeger

November 24, 1971

OPINION LETTER NO. 51
Answer by letter-C.A. Blackmar

Honorable Vernon Bruckerhoff
Representative, District 154
St. Mary's Missouri 63673



Dear Representative Bruckerhoff:

This is in response to your request for an opinion as to whether a third class county must solicit public bids when contracting for ambulance service.

Sections 50.525 to 50.745, RSMo 1969, are known as "The County Budget Law." The County Budget Law was amended by Laws 1965, page 155, to apply to class three and four counties as well as class one and two counties which were the only classes of counties covered prior to that amendment. See Attorney General Opinion No. 80, June 23, 1971, a copy of which is enclosed herein.

Section 50.660, RSMo 1969, which is a part of the County Budget Law and, therefore, applicable to third class counties requires, inter alia, that ". . . All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, . . ." Therefore, a county of the third class contracting for ambulance service is required to secure public bids.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 80
6-23-71, McCuskey

ELECTIONS:
BALLOTS:

When absentee ballots omit the name of a candidate of one party for an office and contain in place of such name, the name of another individual, who is not a candidate, that all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate.

OPINION NO. 52

March 2, 1971

Honorable Buddy Kay
Representative, District 58
Room 301, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Kay:

You have requested an opinion from this office as follows:

"Recently, in an election in St. Louis, absentee voters received the wrong ballots. In explaining this further and for clarification, the ballots had the correct state candidates but as you read down the ballot for lesser offices such as state representatives and magistrates the name appearing on the ballot was incorrect.

"The question that I desire an opinion on is: If the voter voted a straight ticket for either political party would the candidate for that office in that district be entitled to the vote even though his name did not appear on the ballot?"

We find that in *Bradley v. Cox*, 197 S.W. 88 (Mo. banc 1917) a similar question was before the Supreme Court. There had been an election to elect a judge for the Springfield Court of Appeals. Bradley was the Democratic candidate and Cox the Republican candidate. After the election it was discovered that some Democratic ballots bore the name Johnson, who was not a candidate, rather than Bradley. If ballots voted for Johnson were counted for Bradley, he would be the winner, otherwise Cox was the winner. In a decision approved by two judges of the Supreme Court, and concurred in by two other judges, with three judges dissenting, it was determined that the straight party ballots voted for Johnson could properly be counted as votes for Bradley, and Bradley was determined to be the winner. In arriving at this result, the court observed:

". . . Each of the more than 2,000 voters of that county was handed, among others, the official ballot prepared by the clerk, headed 'Democratic Ticket,' and required by the law

Honorable Buddy Kay

to contain the names of every Democratic nominee, including that of contestant. 1,311 of those voters desiring to vote the Democratic ticket returned the official Democratic ballot to the judges of election without erasing the printed name appearing on the ballot as that of the Democratic candidate for the Springfield Court of Appeals, and without writing in the name of any other person as their choice for that office. Without attempting to change it, these voters cast the printed official ballot, properly headed as the ballot of the Democratic party. They selected it as the particular party ballot they desired to vote. They knew the law required that ballot, as given them by the judges, to contain the names of every one of the numerous Democratic nominees for office, including that of the nominee for the Court of Appeals. Knowing this, each delivered the ballot to the judges in the form in which it was officially printed and in which he received it from the election officials, so far, at least, as concerns the office in question. The state had taken out of the hands of these voters the preparation of these ballots. It had prohibited them from using any ballots except those it furnished. It furnished them ballots which lawfully could contain no names other than those of the regular nominees. By so delivering them these ballots it, in effect, said to them:

'This printed ballot, headed with the name of the Democratic party, contains the names, under proper headings, of the Democratic nominees. You must use this ballot if you desire to vote the Democratic ticket. You can use no other. If for some office you wish to vote for some person other than a nominee, you must erase the name of the nominee, printed on the ballot, and write in such other person's name.'

"In effect, therefore, the act of delivering of such ballot also meant that, if the voter desired to vote for all Democratic nominees, all that was necessary for him to do was to redeliver the Democratic ticket to the receiving judges." 197 S.W. at 90-91

Honorable Buddy Kay

The concurring opinion agreed with the result reached in the majority opinion, but went on to note that if the failure to print the proper names on the ballot could be proven to be fraudulent, which was not done in that case, the result would be different.

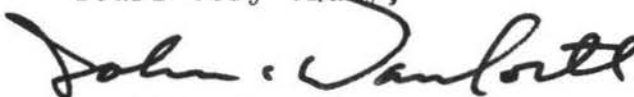
We shall assume for the purposes of this opinion that you are not requesting an opinion on the question as to what would be the result if the candidate's name had been excluded from the absentee ballot because of fraud. Therefore, we believe it is safe to say that four judges of the Supreme Court, a majority of that court, have determined the controlling law on the question which you ask in your opinion request. When a candidate's name is excluded from an absentee ballot by mistake and the name of another individual (who is not a candidate for the particular office by which his name is listed) is placed on the ballot in the location where the candidate's name would properly belong, the votes of voters voting a straight party ticket should be counted for the candidate whose name properly belongs on the ballot, even though another name appears in its place.

CONCLUSION

It is the opinion of this office that when absentee ballots omit the name of a candidate of one party for an office and contain in place of such name, the name of another individual, who is not a candidate, that all straight party ballots of that particular party are to be counted as if the ballots contained the correct name of the candidate.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

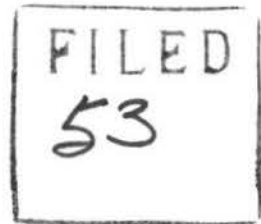
SCHOOLS:
ELECTIONS:
TAXATION (SCHOOLS):

Section 164.021, RSMo 1969, provides that a certain number of voters in a school district may petition the school board requesting that a proposal to raise the school tax rate be submitted to the voters. Upon receipt of a petition in compliance with subsection 1 of Section 164.021, RSMo 1969, the school board must determine the rate of taxation necessary to be levied in excess of the authorized rate but the board is not required to submit the rate, if any, proposed in the petition.

OPINION NO. 53

April 19, 1971

Honorable Stephen Burns
Representative, District 42
Room 203D, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Burns:

This official opinion is issued in response to your request for a ruling on the following question:

"In recent months citizens groups throughout the state have initiated petition campaigns directed at their local School Boards. The purpose of these petitions was to require the school boards to call an election to affirm or reject a school tax levy as specified by the petitioners.

"Missouri Statute 164.021 is apparently the authority for such petitions however this statute has been interpreted by the School Boards in a manner that adversely [sic] affects the petitioners request. Since this interpretation has never been challenged in the Courts I am asking you to request an opinion of the State Attorney General.

"The particular question (as I see it) that should be asked is:

"Does Missouri Statute 164.021 grant to the voters the right to petition a district School Board, such petition calling for the School Board to place before the

Honorable Stephen Burns

voters a proposed school tax levy as specified in the petition, and is such a petition (if found to conform to all the provisions of the above statute) binding on the part of the district School Board?"

We understand from the foregoing that the petition signed by the required number of voters requests that the school board submit to the voters a specific tax rate which is higher than the one currently in effect in the district. You inquire whether under Section 164.021 the school board must submit to the voters the tax rate proposed in the petition.

Subsection 1 of Section 164.021, RSMo 1969, provides as follows:

"Increase of tax rate beyond constitutional limits--procedure.--1. Whenever it becomes necessary, in the judgment of the school board of any school district in the state, to increase the annual rate of taxation beyond the rate authorized by the constitution for district purposes without voter approval, or when voters of the district equal in number to ten percent or more of the number of votes cast for the member of the school board receiving the greater number of votes cast at the last school election in the district petition the board, in writing, for such an increase of the rate, the board shall determine the rate of taxation necessary to be levied in excess of the authorized rate, and the purpose or purposes for which the increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective. The proposal may provide for a greater rate of increase in one or more years than in others and acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years." (Emphasis supplied)

We have searched for a reported decision in Missouri interpreting subsection 1 of Section 164.021 and have found none. Therefore, we must rely on accepted rules of statutory interpretation in answering your question.

Honorable Stephen Burns

The primary rule of statutory interpretation is to ascertain from the language used the intent of the legislature and to put upon the language used its plain and rational meaning in order to promote its object. Donnelly Garment Co. v. Keitel, 354 Mo. 1138, 193 S.W.2d 577, 581 (1946). Primary emphasis must be placed on the language used and all words must be considered in their ordinary and plain meaning. Section 1.090, RSMo 1969; Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 126 (1956); Playboy Club, Inc. v. Myers, 431 S.W.2d 228, 231 (Mo. 1968). When the language of the statute is explicit and unambiguous and its meaning clear and unmistakable:

" . . . there is neither reason nor room for judicial construction . . . and, we find nothing in Section 443.430 (or in any related statute) which would indicate a legislative intent that the non-technical and commonplace language hereinbefore quoted from the cited statute should be construed otherwise than in its natural, plain and ordinary sense and meaning, or which would afford any legitimate basis for refusal to accept and apply that language honestly and faithfully. . . ." State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 55 (Mo.App. 1957); State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S.W.2d 57, 59 (1928)

Subsection 1 of Section 164.021 provides two methods for determining when a school board shall propose a higher tax rate to the voters of the district -- (1) when a higher rate "becomes necessary in the judgment of the school board" or (2) when the required number of voters petition the school board in writing. Upon the happening of either (1) or (2), "the board shall determine the rate of taxation necessary to be levied in excess of the authorized vote. . . ." The ordinary and plain meaning of this provision of subsection 1 is that the school board and not the petitioners determines the tax rate which will be proposed to the voters.

CONCLUSION

Therefore, it is the opinion of this office that Section 164.021, RSMo 1969, provides that a certain number of voters in a school district may petition the school board requesting that a proposal to raise the school tax rate be submitted to the voters. Upon receipt of a petition in compliance with subsection 1 of Section 164.021, RSMo 1969, the school board must determine the rate of taxation necessary to be levied in excess of the authorized rate but the board is not required to submit the rate, if any, proposed in the petition.

Honorable Stephen Burns

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

STATE COLLEGES:
CONSTITUTIONAL LAW:

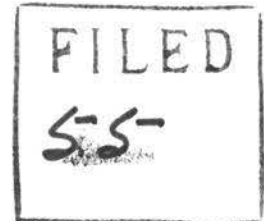
Section 39(3), Article III, Missouri
Constitution of 1945, prohibits the
Missouri General Assembly from au-
thorizing Northeast Missouri State College to pay for extra work
done by a contractor which was not provided for by the contract
between the college and the contractor.

OPINION NO. 55

COMPARE: State ex rel. Milham v. Rickhoff, 633 S.W.2d 733 (Mo banc 1982).

May 27, 1971

Mr. Clyde Burch
College Attorney
Northeast Missouri State College
Kirksville, Missouri 63501



Dear Mr. Burch:

This official opinion is issued in response to your request for a ruling on whether Northeast Missouri State College is legally authorized to pay a contractor for curbing constructed at the site of the new Industrial Education Building on the campus of the college.

From the information furnished to us with your opinion request, we understand the factual situation to be basically as follows: The base bid submitted by the contractor in question included a provision for concrete curbing around part of a parking lot. The specifications for Alternate Bid No. 1-E called in part for placing blacktop curbing around the rest of the parking lot and around another paved area. Alternate Bid No. 1-E submitted on behalf of the contractor was not accepted. Therefore, the contractor in question, who was awarded a contract for the work covered by the base bid, had the responsibility for placing concrete curbing around part of the parking area.

During construction, the contractor, under the mistaken impression that the college had accepted its Alternate Bid 1-E, installed concrete curbing around the area covered by Alternate Bid No. 1-E as well as around the area covered by the base bid. Although the contractor installed concrete curbing instead of asphalt curbing in the area covered by Alternate Bid No. 1-E, the college is using this curbing. Because of the contractor's mistake, the college was able to reduce the cost of the work called for by Alternate Bid No. 1-E.

In summary, the contractor made a mistake in installing concrete curbing in an area not included within the contract between it and the college. Although concrete rather than asphalt curbing was installed by the contractor, the curbing is being used by the college to its financial advantage. Under these circumstances, is the college authorized to pay for the curbing installed by mistake and without a contract?

Mr. Clyde Burch

Article III, Section 39(3), Missouri Constitution of 1945, prohibits the granting of extra compensation to contractors after a contract has been entered into and performed in whole or part. Section 39(3) of Article III provides that:

"The general assembly shall not have power:

* * *

"(3) Extra compensation to public employees or contractors.--To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

Is the General Assembly prohibited from authorizing a state college to grant extra compensation to a contractor for work done outside of the contract between the contractor and the state college? To answer this question, we must first determine whether a state college is a "municipal authority" as that term is used in Section 39(3) of Article III.

The Supreme Court has generally adopted a broad definition of "municipal corporation" in interpreting other provisions of the Missouri Constitution. For instance, in interpreting the provisions of Article X, Section 6, Missouri Constitution 1875, which provided that "all property . . . of the state, counties and other municipal corporations . . . shall be exempt from taxation . . .", the Missouri Supreme Court, in State ex rel. Caldwell v. Little River Drainage Dist., 291 Mo. 72, 236 S.W. 15 (1921), stated:

"The statutes of this state under which drainage districts are organized declare them to be public corporations. Because of their inherent nature and because of the purposes for which primarily they are created, we have repeatedly held that they are not private corporations in any sense; that they are political subdivisions of the state, and exercise prescribed functions of government. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 253, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; Morrison v. Morey, 146 Mo. 543, 561, 48 S. W. 629; Drainage District v. Turney, 235 Mo. 80, 90, 138 S. W. 12. We have also said that they are municipal corporations. Wilson v. Drainage District, 257 Mo. 266, 286, 165 S. W. 734;

Mr. Clyde Burch

State v. Taylor, 224 Mo. 393, 469, 123 S. W. 892. In its strict and primary sense the term 'municipal corporation' applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts. Wilson v. Trustees of Sanitary District, 133 Ill. 443, 464, 27 N. E. 203; Rathbone v. Hopper, 57 Kan. 240, 242, 45 Pac. 610, 34 L. R. A. 674. . . ." Id. at 16. [Emphasis supplied]

In the case of Laret Inv. Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (en banc 1939), the court referred again to the broad definition of "municipal corporation":

"The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service. See Dillon on Municipal Corporations, Fifth Ed. Sec. 32.

"This court has adopted the broader definition. In state ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.'

"See also State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S.W. 848; Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S.W.2d 151; State ex rel. Caldwell v.

Mr. Clyde Burch

Little River Drainage District, 291 Mo. 72, 236 S.W. 15; Harris v. William R. Compton Bond Co., 244 Mo. 664, 149 S.W. 603.

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. . . ." Id. at 68. [Emphasis supplied]

In Koch v. Board of Regents of Northwest Missouri State College, 256 S.W.2d 785 (Mo. 1953), the court, in considering its jurisdiction over the case, concluded as follows with regard to the legal status of a state college:

". . . Under section 174.040, the Board is a legal entity or a quasi-public corporation with 'perpetual succession, with power to sue and be sued, complain and defend in all courts. . . ." Id. at 788.

As pointed out by the Missouri Supreme Court in the Laret case, the definition of "municipal corporation" in its broader sense includes quasi-public corporations designed for the performance of an essential public service. Certainly, state colleges provide such an essential public service. Therefore, we conclude that a state college is included within the broader meaning of "municipal corporation." Because "municipal authority" as used in Article III, Section 39(3) is certainly as broad as--and probably broader than--"municipal corporation," the General Assembly could not grant to a state college any authority prohibited by Section 39(3).

Having reached this conclusion, does Section 39(3) prohibit the college from paying for the curbing mistakenly installed by the contractor in question. We believe that it does.

In Spitcaufsky v. State Highway Commission, 349 Mo. 117, 159 S.W.2d 647 (1942) and Sager v. State Highway Commission, 349 Mo. 341, 160 S.W.2d 757 (1942), the Missouri Supreme Court considered claims by two contractors for extra compensation.¹ In both cases, the State Highway Commission based its defense in part on the predecessor of Section 39(3) (the first clause of Article 4, Section

¹In passing, it is interesting to note that in both Spitcaufsky and Sager the Missouri Supreme Court assumed that the first clause of Section 48, Article IV, Constitution of 1875 (now Section 39(3)) covered the State Highway Commission. Apparently, no issue was raised as to whether the Highway Commission was a "county or municipal authority."

Mr. Clyde Burch

48, Missouri Constitution, 1875). In Sager, the court commented as follows on the language of that part of Section 48 which subsequently became Section 39(3):

"This court held, in the Spitcaufsky case, that the first clause of Section 48 prohibits the Highway Commission from paying extra compensation to a contractor outside the terms of a legal contract; that is, compensation for doing work, for which the legal contract does not provide, or for any claims different from those any other bidder at the letting could have legally asserted in the same circumstances if the contract had been awarded to him. . . ." Id. at 759.

In the instant case, the contractor's claim is precisely what the court in Sager said was prohibited by Section 39(3), i.e., "compensation for doing work for which the legal contract does not provide."

CONCLUSION

Therefore, it is the conclusion of this office that Section 39(3), Article III, Missouri Constitution of 1945, prohibits the Missouri General Assembly from authorizing Northeast Missouri State College to pay for extra work done by a contractor which was not provided for by the contract between the college and the contractor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

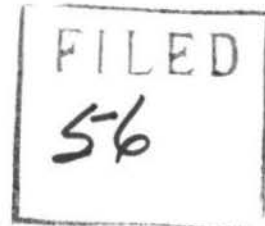
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

May 12, 1971

OPINION LETTER NO. 56
Answer by Letter - Klaffenbach

Mr. Howard L. McFadden
General Counsel
State Department of
Corrections
131 East High Street
Jefferson City, Missouri 65101



Dear Mr. McFadden:

This letter is in answer to your opinion request in which you ask whether the Department of Corrections is required to furnish prosthetic devices for inmates.

We are enclosing our Opinion No. 66, dated May 31, 1956, to the Honorable E. V. Nash, relating to dental care, which is informative although not completely dispositive of the instant question.

In our view Section 216.215, RSMo 1969 which places the care of such persons in the Division of Administration of the Department of Corrections authorizes the department to furnish such necessary devices.

We base this conclusion of our interpretation of the word "care" as used in this section which we believe must be broad enough to meet changing standards. That is the scope of "care" and of the "medical services" rendered under Section 216.255, RSMo 1969 must meet the demands of present constitutional construction. The deprivation of such devices as artificial limbs, hearing aids, glasses, crutches, and the like might support a claim of cruel and inhuman punishment.

Mr. Howard L. McFadden

With respect to the changing construction of the Eighth Amendment to the United States Constitution, the district court stated in Austin v. Harris, 226 F.Supp. 304 (W.D.Mo. 1964) at l.c.308:

"...But it is now established that, apart from historical precedent, what constitutes cruel and unusual punishment within the prohibition of the Eighth Amendment is to be judged in the light of developing civilization, so that what might not have been cruel and unusual yesterday may well be so today. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793."

Having concluded that the furnishing of such devices is authorized it further follows that whether or not such devices must be furnished in particular cases is to be determined by the prison authorities. In our view the holdings with respect to medical care generally apply here. Prison medical officials have wide discretion in treating prisoners. However, failure or refusal to provide medical services may violate the Fourteenth Amendment. Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Schack v. Florida, 391 F.2d 593 (5th Cir. 1968). See also the extensive analysis of Judge Becker in Ramsey v. Ciccone, 310 F.Supp. 600 (W.D.Mo. 1970).

Recent state court decisions such as that of the Supreme Court of Montana in Petition of Gregg, 392 P.2d 87 (1964) have also recognized that in certain instances prison authorities may be required to furnish devices such as hearing aids and eye glasses but whether or not they must do so depends on the circumstances of the particular case.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 66
5-31-56, Nash

ELECTIONS:
ABSENTEE VOTING:

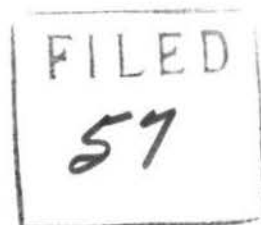
A county clerk is not authorized to
deliver an absentee ballot in person
at a place other than his office and

that the delivery of an absentee ballot in person at a place other
than his office is a violation of the absentee voting laws of
Missouri and constitutes a misdemeanor.

OPINION NO. 57

January 25, 1971

Honorable Samuel J. Short, Jr.
Prosecuting Attorney
Cedar County
Second Floor, Court House
Stockton, Missouri 65785



Dear Mr. Short:

This is in response to your request for an official opinion
on the following questions relating to absentee voting:

"(1) May the County Clerk with or without
being requested to do so deliver an Ap-
plication for Absentee ballot and a ballot
in person at a place other than his office?

"(2) Then after he has delivered the Ap-
plication and ballot in person may he
legally witness the ballot of the person
signing the application and voting the
ballot and take it back to his office.

"(3) If the County Clerk does not have
authority to deliver the Application and
ballot in person and return it personally
to his office, but does so then is he in
violation under Section 112.110 of the
Revised Statutes of Missouri 1969."

Section 112.020, RSMo 1969, provides that an application
for an absentee ballot may be made by the voter in person or by
mail to the election authority, which in this instance is the

Honorable Samuel J. Short, Jr.

county clerk. The two methods by which the ballots may be delivered are prescribed in Section 112.030(2), RSMo 1969 as follows:

"The election authority shall not furnish a ballot to any person who is not lawfully entitled to vote. If the applicant for a ballot is entitled to receive the ballot, the election authority shall send an official ballot in a separate envelope addressed to each absentee voter by certified mail with return receipt or shall deliver in person an official ballot to any applicant applying in person at the office of the election authority." (Emphasis added.)

It appears from the above quoted provision that it is the duty of the clerk to deliver absentee ballots. Accordingly, the performance of such duty must be regarded as a transaction of official business.

The legislature has directed that the place where the transaction of official business by the clerk is his office. Section 51.100 is as follows:

"Each clerk of the county court shall keep his office at such place or places as the county court shall direct, not more than two hundred yards from the courthouse or permanent place of holding court of which he is clerk, and there shall keep the records, papers, seal and property of his office and transact his official business."

Section 51.110 in certain instances authorizes the establishment of a branch county clerk's office ". . . where all the records and proceedings at such place shall be safely kept and preserved, and all acts done and performed at such place shall have the same force and effect as if done at the county seat".

It appears therefore, that delivery of absentee ballots in person is required to be made at a place where the clerk is authorized to transact official business, namely his office. Accordingly, the county clerk is not authorized to deliver an

Honorable Samuel J. Short, Jr.

absentee ballot in person at a place other than his office. The answers to your first two questions therefore must be in the negative.

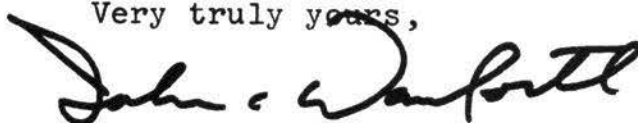
Your final question is whether a clerk who delivers an absentee ballot in person at a place other than his office is in violation of the absentee voting laws of Missouri. In the case of Elliott v. Hogan, 315 S.W.2d 840, the Supreme Court held that the absentee voting laws are mandatory. We are enclosing a copy of Opinion No. 500, issued November 3, 1966, to Honorable Fred Murdock, wherein this case is discussed and the view expressed that Chapter 112, RSMo on absentee voting is mandatory and limits absentee balloting to precise procedures spelled out in the statute. It is our view that the words of the statute providing that the clerk "shall deliver in person an official ballot to any applicant applying in person at the office" are mandatory and that delivery of the ballot in person outside of the clerk's office is a violation of Section 112.030(2) and constitutes a misdemeanor. Section 112.110 to which you refer in your opinion request provides that a violation of any of the provisions in the absentee voting law which includes Section 112.030(2) is a misdemeanor.

CONCLUSION

It is therefore, the opinion of this office that a county clerk is not authorized to deliver an absentee ballot in person at a place other than his office and that the delivery of an absentee ballot in person at a place other than his office is a violation of the absentee voting laws of Missouri and constitutes a misdemeanor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 500
11-3-66, Murdock

SCHOOLS:
JUNIOR COLLEGE DISTRICTS:
CONSTITUTIONAL LAW:

1. The amendments to Section 11(c) of Article X of the Missouri Constitution adopted by the voters on November 3, 1970, apply to junior

college districts organized under Sections 178.770 through 178.890, RSMo 1969. 2. Pursuant to Section 11(c) of Article X of the Missouri Constitution, the tax rate for school purposes approved by the voters of a junior college district in 1970 will apply in 1971 (a) provided the board of trustees of the district does not propose a higher tax rate for 1971, and does not levy a lower tax rate for 1971 than that approved by the voters for 1970, or (b) if the board of trustees proposes a higher tax rate for 1971 than that approved by the voters for 1970, and the proposal is defeated by the qualified voters of the district.

OPINION NO. 58

January 8, 1971

Honorable William C. Phelps
State Representative
Fourth District
5016 Grand
Kansas City, Missouri 64112



Dear Representative Phelps:

This is in response to your request for an opinion from this office with regard to the following inquiry:

"I urgently need and request an opinion from your office on the following questions which relate to Section 11(c) of Article X of the Constitution of Missouri as enacted at the General Election on Tuesday, November 3, 1970:

"1. Do the provisions of the recently enacted Section 11(c) of Article X of the Constitution of Missouri, insofar as they relate to school districts, apply to junior college districts organized under the Missouri statutes now desig-

Honorable William C. Phelps

nated as Sections 178.770 through 178.890, R.S.Mo. 1969?

"2. If such a junior college district, pursuant to Section 178.870, R.S.Mo., 1969, and Chapter 164, R.S.Mo., 1969, increased its tax rate for school purposes for the year 1970 by voter approval above the limits provided in said Section 178.870, will such increased rate apply for 1971

"(a) provided the board of trustees of the district does not propose a higher tax rate for 1971 and does not levy a lower tax rate for 1971 than that approved by the voters for the year 1970, or

"(b) if the board of trustees of the district proposes a higher tax rate for school purposes for 1971 than that approved for the year 1970 and the proposal is defeated by the qualified voters in the district?"

In its entirety, Section 11(c) of Article X of the Missouri Constitution, which was approved by the voters at the General Election on November 3, 1970, and which became effective thirty days thereafter, reads as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, except as herein provided, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased

Honorable William C. Phelps

for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, except as herein provided, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided, that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters; provided, that in school districts where the qualified voters have voted against a proposed higher tax rate for school purposes, then the rate shall remain at the rate approved in the last previous school election except that the board of education shall be free to resubmit any higher tax rate at any time; provided that any board of education may levy a lower tax rate than approved by the voters as authorized by any provision of this section; and provided, that the rates herein fixed, and the amounts by which they may be increased may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

With reference to Question No. 1, Section 11(c) begins as follows: "In all . . . school districts the rates of taxation as herein limited may be increased. . . ." "As herein limited" refers to Section 11(b) which provides with regard to school districts as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * *

Honorable William C. Phelps

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

We believe that "all other school districts" as used in Section 11(b) and "all . . . school districts" as used in the opening clause of Section 11(c) include junior college districts organized pursuant to Section 178.770 through 178.890, RSMo 1969. In Three Rivers Junior College District v. Statler, 421 S.W.2d 235 (Banc, 1967), the Supreme Court of Missouri had before it the question "whether the portions of Article X, Section 11(b) which refer to school districts, mean that each school district is authorized to levy the full amount stated, even though there may be more than one layer of school districts covering a given territory, or whether all the school districts in a given area combined must stay within the limits specified." Id. at 239. The Court concluded that each school district, including junior college districts, is authorized to levy the full amount stated in Article X, Section 11(b) unless, as is the case with junior colleges, the rates in Section 11(b) are further limited by law as provided in Section 11(c). In reaching this conclusion the Supreme Court assumed that junior college districts were "school districts" as that term is used in the last subparagraph of Section 11(b) and in Section 11(c):

". . . The language of Section 11(b) is not 'For school districts formed of cities and towns--collectively a total of one dollar and twenty-five cents' or 'For all other school districts collectively in the same county or area--a total of sixty-five cents'. The language simply is 'For school districts formed of cities and towns' and 'For all other school districts'. In our opinion this language does not prohibit the legislature from authorizing a junior college district overlying one or many local school districts to levy a separate tax as set forth in Sec. 178.870, *supra*, and we return to the basic principle mentioned earlier that the General Assembly, unless restrained by the constitution, is

Honorable William C. Phelps

vested in its representative capacity with all the primary power of the people and that the legislature has the power to enact any law not prohibited by the federal or state constitution, see cases on page 3, supra. We therefore hold respondent was in error in holding that the 40 cents levy, when added to the other levies by other school districts in the respective counties and the junior college district, exceeds the constitutional limitation on levies by school districts prescribed by Section 11(b), Article X of the 1945 constitution. Whether the junior college district levy exceeds the constitutional limitation must be determined by the size of its levy alone." Id. at 242-243. (Emphasis supplied.)

Therefore, we conclude that junior college districts are "school districts" as that term is used in the last subparagraph of Section 11(b). Section 11(c) both before and after the amendment approved in November, 1970, begins with "In all. . . school districts. . . ." Consistent with the Three Rivers case this general language would include junior college districts. Is there anything in the language added to Section 11(c) by the voters at the general election on November 3, 1970, which would indicate an intention to restrict its coverage to school districts other than junior college districts? The added language is as follows:

". . . provided, that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters; provided, that in school districts where the qualified voters have voted against a proposed higher tax rate for school purposes, then the rate shall remain at the rate approved in the last previous school election except that the board of education shall be free to resubmit any higher tax rate at any time; provided that any board of education may levy a lower tax rate than approved by the voters as authorized by any provision of this section; . . ." (Emphasis supplied.)

Honorable William C. Phelps

The coverage of this amendment is not limited to particular school districts. We find nothing in the language of this amendment restricting its application to less than "all. . . school districts", including junior college districts.

Your second question inquires whether the board of trustees of a junior college could levy in 1971 the increased tax rate approved by the voters in 1970 under two different factual situations. The first factual situation, denoted (a) in your letter, assumes that the board of trustees of the district would not propose a higher rate for 1971 nor would the board levy a lower rate for 1971 than that approved by the voters for the year 1970. Pursuant to Section 11(c) of Article X as amended in November, 1970, the last tax rate approved by the voters would continue in 1971 under this factual situation. See Opinion No. 546, dated November 20, 1970, to Honorable Robert L. Prange, a copy of which is enclosed herewith.

In subparagraph (b) of your second question you request that we assume that the board of trustees of the district proposed a higher tax rate for 1971 than that approved by the voters for the year 1970, and the proposal was defeated by the qualified voters of the district. We believe that this question is answered by the following language of Section 11(c), Article X:

" . . . provided, that in school districts where the qualified voters have voted against a proposed higher tax rate for school purposes, then the rate shall remain at the rate approved in the last previous school election except that the board of education shall be free to re-submit any higher tax rate at any time; . . . "

CONCLUSION

It is the opinion of this office that:

1. The amendments to Section 11(c) of Article X of the Missouri Constitution adopted by the voters on November 3, 1970 apply to junior college districts organized under Sections 178.770 through 178.890, RSMo 1969.

2. Pursuant to Section 11(c) of Article X of the Missouri Constitution, the tax rate for school purposes approved by the voters of a junior college district in 1970 will apply in 1971 (a) provided the board of trustees of the district does not pro-

Honorable William C. Phelps

pose a higher tax rate for 1971, and does not levy a lower tax rate for 1971 than that approved by the voters for 1970, or (b) if the board of trustees proposes a higher tax rate for 1971 than that approved by the voters for 1970, and the proposal is defeated by the qualified voters of the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 546
11-20-70, Prange

MOTOR VEHICLES:
MOTOR VEHICLE SAFETY RESPONSIBILITY:

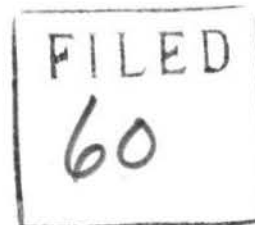
The Director of Revenue is required to accept and process motor vehicle accident

reports involving death, personal injury or property damage in excess of one hundred dollars submitted at any time by persons connected with such accidents.

April 9, 1971

OPINION NO. 60

Mr. Richard R. Nacy, Jr.
General Counsel
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Nacy:

This official opinion is rendered pursuant to the request contained in your letter concerning the processing of accident reports by the Safety Responsibility Unit of the Department of Revenue.

The factual situation as outlined in your letter is as follows:

"In August, 1968, an automobile struck and injured a pedestrian walking along the side of the road in Ballwin, Missouri. The pedestrian was a girl of eight years of age.

"No report of accident was filed with the Safety Responsibility Unit of the Department of Revenue by either the driver of the motor vehicle, or the pedestrian or anyone for her, until more than two years later when, on September 10, 1970, a report of accident was filed on behalf of the injured girl. The driver of the automobile still has filed no report."

The questions presented are whether there is any duty for the Department of Revenue under the Motor Vehicle Safety Responsibility Law to process a report of an accident made after the lapse of two years and whether there is any applicable statute of limitations covering this situation.

The Motor Vehicle Safety Responsibility Law is set forth in Chapter 303, RSMo 1969. Section 303.030, in part pertinent to this

Mr. Richard R. Nacy, Jr.

opinion, reads as follows:

"1. If within twenty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars, the director does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection 2 of this section has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the director shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment for damages resulting from such accident as may be recovered against each operator or owner.

"2. The director shall, within forty-five days after the receipt of such report of a motor vehicle accident, suspend the license of each operator, and all registrations of each owner of a motor vehicle, in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the director; provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security."

Section 303.040, RSMo 1969, provides:

"The operator of every motor vehicle which is in any manner involved in an accident within this state, upon the streets or highways thereof, in which any person is killed or injured or in which damage to property of any one person, including himself, in excess of one hundred dollars is sustained, shall within ten days after such accident report the matter in writing to the director. Such report, the form of which shall be prescribed by the director, shall contain such information as will enable the director to determine whether the requirements for the deposit of security under section 303.030 are

Mr. Richard R. Nacy, Jr.

inapplicable by reason of the existence of insurance or other exceptions specified in this chapter. . . . "

Section 303.290, RSMo 1969, in part, provides:

"1. The director of revenue shall administer and enforce the provisions of this chapter and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the director under the provisions of this chapter."

Section 303.370, RSMo 1969, in part, states:

"1. Failure to report an accident as required in section 303.040 shall be punished by a fine not in excess of five hundred dollars, and in the event of injury or damage to the person or property of another in such accident, the director shall suspend the license of the person failing to make such report, . . . until such report has been filed and for such further period not to exceed thirty days as the director may fix."

As indicated above, the law places on the Director of Revenue the duty of administering the Safety Responsibility Law. This law does not contain any provision which limits the time within which accident reports may be filed. There are no other specific statutes relating to this situation and the general statute of limitations provisions contained in Chapter 516, RSMo 1969, apply to legal causes of action initiated in courts of law. Under these circumstances it is our view that a report of accident involving death, personal injury or damage in excess of one hundred dollars may be filed at any time whereupon it is incumbent upon the Director of Revenue to carry out his duties and functions as outlined in this statute.

It is our further opinion that Section 303.030, Section 303.290, as well as the other provisions of this statute, should be construed to authorize the filing of an accident report by any person who has suffered personal injury or damage as a result of a motor vehicle accident. The provisions of Section 303.040 are not to be so interpreted as to exclude the filing of an accident report by a pedestrian or non-operator who has suffered personal injury in an accident.

CONCLUSION

It is therefore the opinion of this office that the Director of Revenue is required to accept and process motor vehicle accident reports involving death, personal injury or property damage in excess of one hundred dollars submitted at any time by persons connected with such accidents.

Mr. Richard R. Nancy, Jr.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

JOHN C. DANFORTH
Attorney General

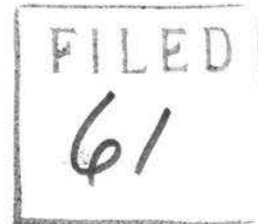
MOTOR VEHICLES:

Municipalities have no authority to establish vehicular weight or size regulations imposing greater restrictions than state law.

OPINION NO. 61

March 16, 1971

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County Court House
415 West Main Street
Savannah, Missouri 64485



Dear Mr. Lance:

This opinion is in response to your request in which you ask the following question:

"Do the city authorities in cities, towns and municipalities having less than 75,000 population, have the authority to establish by ordinance regulations setting weight, height, width and length limitations lower than the general limitations established by the State Legislature, in the sections of law cited, particularly Section 304.180?"

Section 304.170, RSMo 1969, provides for the regulation as to the width, height, and length of motor vehicles with certain exceptions; and Section 304.180, RSMo 1969, contains regulations as to weight of vehicles. Both of these sections are of general application and apply to vehicles operated upon the highways of this state.

Section 301.010, RSMo 1969, provides in part:

"As used in chapter 301 and sections 304.010 to 304.040 and 304.120 to 304.570, RSMo, the following terms mean:

* * *

"(9) 'Highway,' any public thoroughfare for vehicles, including state

Honorable Alden S. Lance

roads, county roads and public streets,
avenues, boulevards, parkways or alleys
in any municipality: ..."

Additionally, Section 304.190, RSMo 1969, which applies to motor vehicles operated exclusively within the corporate limits of cities containing seventy-five thousand inhabitants or more or within two miles of the corporate limits of the city or within the commercial zone of the city, provides that such vehicles shall not exceed certain size and weight limitations.

The general application of Sections 304.170 and 304.180 as opposed to the specific application of Section 304.190 was noted by the Supreme Court in State v. Chadeayne, 323 S.W.2d 680 (Mo. en banc 1959).

It is, of course, recognized that the highways of the state are subject to reasonable regulation and supervision by the state in the exercise of its police power and that this police power may be delegated by the state. State v. City of Mexico, 197 S.W.2d 301 (Mo. 1946).

Our legislature has provided by Section 304.120 RSMo 1969, that the municipalities may, by ordinance, establish certain regulations relating to motor vehicles. Subsection 2(4) of that section provides that municipalities may limit the use of certain designated streets and boulevards to passenger vehicles. However, nowhere in that section is there any authority for municipalities to impose lower limits than those provided in the sections noted above.

In this respect the St. Louis Court of Appeals in City of St. Louis v. Stenson, 333 S.W.2d 529 (1960), in considering the authority of the City of St. Louis to impose such greater restrictions, stated at l.c. 534:

"Absent any statutory or ordinance regulation, commercial vehicles and combinations of same of any weight, height or length would be permitted to use the highways of the City of St. Louis. The State of Missouri has seen fit through §304.170 to prohibit the operation on its highways of a combination of vehicles that exceed 45 feet in length. The State of Missouri has spoken and any attempt by ordinance to lower that limit would be in conflict with §304.170.

* * *

Honorable Alden S. Lance

"It is the contention of the City of St. Louis that in addition to the power conferred to regulate traffic as specifically designated in said subdivision 2 of §304.120, this statute confers general authority to pass ordinances regulating traffic within the City of St. Louis. Defendant contends the first part of subdivision 2 of said section is general in terms and that the seven specifically designated types of regulations following the first part must be construed as a limitation upon the generality of the language contained in the first part of said subdivision 2 of §304.120. We need not resolve this conflict in contentions because subdivision 3 of §304.120 declares invalid any ordinance 'which contains provisions contrary to or in conflict with' Chapter 304 RSMO 1949, V.A.M.S. Also, it should be pointed out that §304.120 does not by specific direction authorize a municipality to regulate the length of commercial vehicles operating within its corporate limits."

The above holding was noted and restated by the St. Louis Court of Appeals in City of Richmond Heights v. Shackelford, 446 S.W.2d 179 (1969). The Court however there distinguished the City of St. Louis case and held that a city has a full grant of power to forbid all commercial vehicles but may choose to exercise only part of such power by a municipal ordinance prohibiting from certain streets all commercial vehicles save those used in making deliveries to certain places within such streets.

By comparison, the legislature has provided that municipalities may, within certain limitations, issue trip permits for vehicles exceeding the limitations on width, length, height, and weight specified in the above sections for definite periods for the use of the streets by such vehicles within the limits of such municipalities. Section 304.200, RSMO 1969.

The conclusion that we reach in answer to your question is that the legislature has provided for certain weight and size limitations on vehicles used on the highways of this state as defined and has authorized municipalities to limit

Honorable Alden S. Lance

the use of certain designated streets and boulevards to passenger vehicles but has not authorized the municipalities to establish restrictions greater than those established by the state statutes.

CONCLUSION

It is the opinion of this office that municipalities have no authority to establish vehicular weight or size regulations imposing greater restrictions than state law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

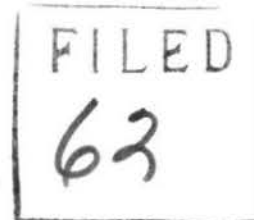
JOHN C. DANFORTH
Attorney General

TAXATION (INHERITANCE): The bequests to Father Edward Roche, Father Gregory Wooler and Sister Reginald Wollenshlager provided in Article III, (3), (4) and (5), respectively, of the Last Will and Testament of Bess E. Wollenshlager, deceased, are not exempt from Missouri Inheritance Tax by virtue of Section 145.100, RSMo 1969. They constitute taxable transfers under Section 145.020, RSMo 1969.

April 9, 1971

OPINION NO. 62

Honorable James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This official opinion is issued pursuant to the request contained in your letter concerning the taxability of bequests to members of certain religious orders under the provisions of the Last Will and Testament of Bess E. Wollenshlager, deceased.

The facts, as outlined in your letter, and the question raised are as follows:

"Bequests in a decedent's will pass directly to individuals belonging to a religious order. Said bequests are not designated by will to pass to or for the use of the religious order as required by Section 145.100. The attorney for the estate contends beneficiaries of the religious orders are required to take a vow of poverty and cannot be the recipients of such bequests, resulting in a gift by the beneficiaries unto the religious order.

"Are said bequests tax exempt under Section 145.100 or would the transfers be deemed a transfer within the meaning of Section 145.040, taxable at the same rate and subject to the same duties and liabilities as any other form of transfer provided in this chapter?"

Honorable James E. Schaffner

For purposes of this opinion we are assuming that reference to Section 145.040 is in error and that such reference should be Section 145.020.

An examination of decedent's Last Will and Testament discloses direct specific bequests to certain religious orders and charities as well as to certain individuals. Article III, in pertinent part, provides as follows:

"I give, devise and bequeath to each of the following the amount noted:

- (1) The sum of One Thousand Dollars (\$1,000.00) to the Maryknoll Fathers (American Mission Society), Maryknoll, New York;
- (2) The sum of Two Thousand Dollars (\$2,000.00) to the Little Sisters of the Poor, 3400 South Grand Avenue, St. Louis, Missouri;
- (3) The sum of One Thousand Dollars (\$1,000.00) to Father Edward Roche, Vincentian Foreign Mission Society, 1849 Cass Avenue, St. Louis, Missouri;
- (4) The sum of Five Thousand Dollars (\$5,000.00) to Father Gregory Wooler, O.F.M., Three Rivers, California, my brother-in-law;
- (5) The sum of One Hundred Dollars (\$100.00) to Sister Reginald Wollenshlager, O.F.S., my sister-in-law;"

The question relates to the taxability of the bequests made by Article III (3), (4) and (5), above.

Section 145.020, RSMo 1969, provides as follows:

"A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associations or corporations, not herein exempted, in the following cases:

- (1) When the transfer, by will or the intestate laws is from any person who is a resident of this state at the time of his death."

Honorable James E. Schaffner

The decedent, Bess E. Wollenshlager, was a resident of the State of Missouri at the time of her death. Her will was admitted for probate in the Probate Court of St. Louis County, Missouri.

Section 145.100, RSMo 1969, provides as follows:

"When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members."

The contention has been made that the bequests provided by Article III, (3), (4) and (5), of decedent's will are not taxable because these individuals are required to take a vow of poverty and cannot be the recipients of the bequests, resulting in a gift by the beneficiaries to the religious orders.

Assuming this is true, if the beneficiaries are prevented by law from accepting the bequests, it would cause such legacies to lapse and it is assumed they would then become a part of decedent's residuary estate and be disposed of accordingly. Under these circumstances the charity would not take the bequests and they would be taxable to the residuary beneficiaries. If, however, the bequests are considered as being given by the individual legatees to the religious orders, then it must be concluded that these individuals had to take the bequests, if only momentarily, in order to give them away. This taking by them is the taxable event.

Aside from this, the state is not chargeable with knowledge of or duty to supervise the private contracts or obligations between religious orders and their members. Also, the language used in decedent's will is clear and unambiguous in directing the gifts to the individuals rather than the religious orders, as was done in Article III (1) and (2). In fact, the will indicates that Father Gregory Wooler and Sister Reginald Wollenshlager were the brother-in-law and sister-in-law of the decedent, thus indicating a natural object of her bounty. If these persons were to take in trust for the religious orders, of which they are members, the will would have so provided.

Our view is that the Director of Revenue cannot assume that it was testator's intent to make the bequests to the charities rather

Honorable James E. Schaffner

than the individuals. This is particularly true considering the plain and unequivocal language used in the will. Accordingly, a tax is imposed upon the bequests by Section 145.020, RSMo 1969, and the exemption contained in Section 145.100 does not apply under the circumstances here involved.

CONCLUSION

It is the opinion of this office that the bequests to Father Edward Roche, Father Gregory Wooler and Sister Reginald Wollenshlager provided in Article III, (3), (4) and (5) respectively, of the Last Will and Testament of Bess E. Wollenshlager, deceased, are not exempt from Missouri Inheritance Tax by virtue of Section 145.100, RSMo 1969. They constitute taxable transfers under Section 145.020, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

JOHN C. DANFORTH
Attorney General

June 14, 1971

Answer by letter-Wieler

OPINION LETTER NO. 64

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
P. O. Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in response to your request for an opinion concerning the administration and disbursement of federal funds received by this state under Public Law 89-665, popularly known as the National Historic Preservation Act of 1966 (16 U.S.C.A., Section 470, et seq.). Specifically, you have asked for our opinion as to the legality of your actions in depositing federal funds in the state treasury and subsequently having checks written to private individuals or private historic groups or political subdivisions, and whether such funds can be deposited in an "existing" account in the state treasury or whether a new account has to be created to provide for federal funds earmarked for "projects," as defined in the federal law. We assume your reference to "account" is a reference to an account established by the comptroller in compliance with an appropriation law.

16 U.S.C.A., Section 470 provides:

"The Congress finds and declares--

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved

Mr. Joseph Jaeger, Jr.

as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and non-governmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities."

16 U.S.C.A., Section 470a provides:

"(a) The Secretary of the Interior is authorized--

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public

Mr. Joseph Jaeger, Jr.

benefit of properties that are significant in American history, architecture, archeology, and culture; and

(3) to establish a program of matching grant-in-aid to the National Trust for Historic Preservation in the United States, chartered by act of Congress approved October 26, 1949 (63 Stat. 927), as amended, for the purpose of carrying out the responsibilities of the National Trust.

"(b) As used in sections 470 to 470b and 470c to 470n of this title--

(1) The term 'State' includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term 'project' means programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure the preservation for public benefit of any such historical properties.

(3) The term 'historic preservation' includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term 'Secretary' means the Secretary of the Interior."

Thus, it can be seen the National Historic Preservation Act of 1966 provides for federal funds on a matching basis in two areas, i.e., funds to the states for the purpose of preparing comprehensive statewide historic surveys and plans, and funds to the states for projects having as their purpose the preservation for public benefit of property that is significant in American history, architecture, archeology, and culture. It is our understanding that

Mr. Joseph Jaeger, Jr.

these funds are channeled into the state treasury through you as state liaison officer for the project, having been named as such by the Governor, because of your position as Director of the Missouri State Park Board, the agency responsible for the preservation of historic sites in this state. See Chapter 253, RSMo 1969.

The Missouri legislature appropriated funds to provide matching state aid for the purpose of carrying out a statewide historic survey and plan in 1968 and has annually appropriated money for this purpose since. See Section 4.530, House Bill No. 4, Third Extra Session, 75th General Assembly. Also, at that time expenditures by the State Park Board out of federal funds from the National Historic Preservation Act of 1966 deposited in the state treasury were authorized. See Section 4.575, House Bill No. 4, First Extra Session, 74th General Assembly, as contained in Laws 1967, page 824. Annual legislation for this purpose has been passed since that date. See Section 4.535, House Bill No. 4, Third Extra Session, 75th General Assembly.

It is apparent then that the Missouri legislature has authorized the expenditure of all federal funds under the National Historic Preservation Act of 1966, whether such funds be for the purpose of the comprehensive survey or for projects involving the preservation of properties that are significant in American history, architecture, archeology, and culture; and that all funds received from the federal government for either purpose can be deposited in the existing account.

With respect to your request for an opinion concerning the legality of ordering checks written from the state treasury to private individuals or private historic groups or political subdivisions from federal funds earmarked for the purpose of carrying out "projects" as contemplated by the federal legislation, it is our opinion that such action is most certainly legal under applicable Missouri law.

The intent of Congress in this area is perfectly clear, the preservation of all sites, buildings or objects that are culturally or historically significant. To this end, the National Historic Preservation Act of 1966 authorizes the Secretary of Interior to establish programs of matching grants-in-aid to states for projects having as their purpose the preservation of such monuments. As shown above, the term "project" in this law means programs of state and local governments and other public bodies and private organizations and individuals for the acquisition of title or interest in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection

Mr. Joseph Jaeger, Jr.

therewith, and for its development in order to assure the preservation for public benefit of any such historical properties.

A grant of federal funds to this state by the Secretary of Interior for such a project can be placed in the state treasury and expended therefrom, according to whatever terms and conditions the Secretary of Interior requires, under the provisions of Article III, Section 38(a) of the Missouri Constitution which provides:

" . . . Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Therefore, federal funds placed in the state treasury for "projects," as that term is defined in the National Historic Preservation Act of 1966 can be withdrawn pursuant to your requisition payable to private individuals or private historic groups or political subdivisions.

Yours very truly,

JOHN C. DANFORTH
Attorney General

May 7, 1971

Answer by letter-Jones

OPINION LETTER NO. 66

James A. Mertz, D.C., Secretary
State Board of Chiropractic Examiners
5121 South Kingshighway
St. Louis, Missouri 63109



Dear Dr. Mertz:

This is to acknowledge receipt of your request for an opinion from this office in regard to the performing of investigations by the State Board of Chiropractic Examiners and/or the hiring of investigators.

Subsection 9 of Section 331.060, RSMo 1969, as set forth in House Bill No. 85, of the 75th General Assembly, now provides that the Board of Chiropractic Examiners shall suspend or revoke the license of any chiropractor if it is determined as provided by Chapter 161, RSMo 1969, that a licensee is guilty of certain statutory violations. Previously, subsection 1 of Section 311.060, RSMo 1959, read as follows:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it deems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after the depositing of said communication in the United States mail." (Emphasis ours)

James A. Mertz, D.C.

Senate Bill No. 284, enacted by the 73rd General Assembly and incorporated into the Revised Statutes as Sections 161.252 through 161.342, RSMo Cum. Supp. 1965, established the Administrative Hearing Commission. Under these statutory provisions, the Administrative Hearing Commission has exclusive authority under the law to conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law a license issued by the State Board of Chiropractic Examiners could be revoked or suspended. In this regard, Section 11 of Senate Bill No. 284, which was not included in RSMo Cum. Supp. 1965, nor has it been included in the Missouri Revised Statutes of 1969, provided as follows:

"Section 11. Any provisions of existing statutes pertaining to the administrative agencies listed in section 3 [161.272] which are in conflict with this act are repealed."

However, Section 161.282, RSMo Cum. Supp. 1965, specifically provides for the initiation of proceedings before the Administrative Hearing Commission "Upon receipt of a written complaint from an agency . . . or upon receipt of such complaint from the attorney general, . . ." (Emphasis ours).

As a result of the above statutory provisions, it is our view that although the Administrative Hearing Commission Act and subsequently House Bill No. 85 of the 75th General Assembly have repealed the statutory authority of the State Board of Chiropractic Examiners to conduct formal hearings and to make findings of fact and conclusions of law in regard to complaints upon which licenses of chiropractors may be suspended or revoked, such complaints received by the State Board are not to be transferred in a routine manner to the Administrative Hearing Commission. The State Board of Chiropractic Examiners has the authority and duty to investigate the validity of such complaints for the purpose of determining whether or not it should lodge a complaint against the licensee with the Administrative Hearing Commission. Although the State Board of Chiropractic Examiners does not have authority to compel the attendance of witnesses and the production of records and papers, its investigation may proceed by means that are reasonable and necessary. This is not to say that members of the Board have the authority to enter a practitioner's office to secure information for possible disciplinary action without the consent of the licensee. It is our view, however, that the State Board has authority to hire an investigator to obtain information necessary to determine whether the Board should file a complaint with the Administrative Hearing Commission.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CHIROPRACTIC
LICENSES:

1. The State Board of Chiropractic Examiners has the authority not to renew a license to practice chiropractic for non-compliance with the two-day educational requirement or non-payment of the ten dollar annual renewal fee as required by subsection 2 of Section 331.050, RSMo 1969. 2. If there are other allegations or complaints which justify disciplinary action against a licensee, the State Board of Chiropractic Examiners must file a complaint with the Administrative Hearing Commission as provided in Section 161.282, RSMo 1969.

OPINION NO. 67

March 25, 1971

Dr. James A. Mertz, D.C.
Secretary, State Board of
Chiropractic Examiners
5121 South Kingshighway
St. Louis, Missouri 63109



Dear Dr. Mertz:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"The Missouri Board of Chiropractic Examiners requests a formal opinion as to the Board's authority to not renew a license to practice chiropractic for non-compliance with the two-day educational requirement and/or non-payment of the \$10 annual renewal fee."

In regard to the above, subsection 2 of Section 331.050, RSMo 1969, reads as follows:

"2. All persons once licensed to practice chiropractic in this state shall pay on or before June thirtieth of each year after a license is issued to them as provided by law, to the state board of chiropractic examiners, an annual renewal license fee of ten dollars and shall furnish to the board

Dr. James A. Mertz, D.C.

satisfactory evidence that he has attended a two-day educational program as approved by the board, and no person shall practice chiropractic after July first of each year following the issuance or last renewal of the license without a renewal. . . ."

In Letter Opinion No. 125, rendered to Honorable F. L. Brenton on March 10, 1970 (copy enclosed), it was held that subsection 2 of Section 331.050, as set forth in House Bill 85 requiring a chiropractor to pay to the State Board of Chiropractic Examiners an annual license fee of ten dollars and furnish to the Board satisfactory evidence that an individual had attended a two-day educational program as approved by the Board, in order to obtain a renewal of his license, was not unconstitutional.

It is our understanding that the opinion request results from the recent case of State ex rel. American Institute of Marketing Systems, Inc., et al. v. Missouri Real Estate Commission, 461 S.W.2d 902 (K.C. Mo.App. 1970). This was a proceeding in prohibition by relator, American Institute of Marketing Systems, Inc., to prohibit the respondent, Missouri Real Estate Commission from continuing with hearings concerning the relators right to renewal of their respective real estate licenses. The prime contention of relators was that respondent no longer had legal authority to hold such a hearing since the enactment of the "Administrative Hearing Commission Act" in 1965. Section 339.060, RSMo 1969 provided that annual real estate licenses would expire on the thirtieth day of June each year and require fees for renewal thereof. As to the requirements of renewal, it was specified:

" . . . In the absence of any reason or condition which might warrant the refusal of the granting of a license, the commission shall issue a new license for each ensuing year upon receipt of the written application of the applicant and the renewal fee herein required."

Subsection 1 of Section 339.080, RSMo 1969 also provided:

"The commission may deny an application for a license, or suspend or revoke a license issued, only after a hearing, . . ."

The respondent Commission therefore argued that the renewal of a license was equated with the original issuance of a

Dr. James A. Mertz, D.C.

license and that Section 339.080, RSMo 1969, required it to hold a hearing before it could deny an application for renewal.

The Kansas City Court of Appeals held that the Missouri Real Estate Commission was without statutory authority to conduct an evidentiary hearing into the qualifications of realtors for renewal of their licenses; that it must act on the application for renewal which could contain such pertinent information as the commission deemed fit to require. If the Real Estate Commission thought there was reason to suspend or revoke a license, it must file its complaint with the Administrative Hearing Commission and could take disciplinary action only after a hearing and findings of fact and conclusions of law by the Administrative Hearing Commission. However, it is important to note the language of the court on page 906 of its opinion which reads as follows:

"Furthermore, Section 339.060 requires renewal by the real estate commission 'in the absence of any reason or condition which might warrant the refusal of the granting of a license.' When read in context, this obviously refers to established reasons or conditions such as prior disciplinary action which is still in effect or conviction coming within the purview of Section 339.110. This section 339.060 refers to 'the absence of any reason or condition.' It does not refer to the absence of any allegations or complaints, which, if found to be true, 'might warrant the refusal of the granting of a license.' The situation in the present case comes within the latter category. We do not have established reasons or conditions, we have only allegations. Under such circumstances, said Section 339.060 requires that the commission renew the license. If there are allegations or complaints which justify disciplinary action against the licensees, the real estate commission may file a complaint with the administrative hearing commission as provided in Section 161.282, and that commission will hold a hearing, make findings of fact and conclusions of law, and if it finds that the allegations are sustained by the evidence, the real estate commission may then determine the disciplinary action to be imposed. . . ."

Dr. James A. Mertz, D.C.

As a result of the above, it is our view that the State Board of Chiropractic Examiners has the authority to not renew a license to practice chiropractic for non-compliance with the two-day educational requirement or non-payment of the ten dollar annual renewal fee as required by subsection 2 of Section 331.050, RSMo 1969. However, if there are other allegations or complaints which justify disciplinary action against a licensee, the State Board of Chiropractic Examiners must file a complaint with the Administrative Hearing Commission as provided in Section 161.282, RSMo 1969.

CONCLUSION

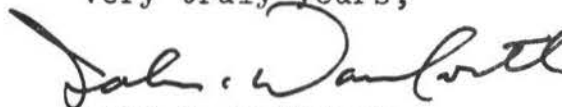
The opinion of this office is as follows:

1. The State Board of Chiropractic Examiners has the authority not to renew a license to practice chiropractic for non-compliance with the two-day educational requirement or non-payment of the ten dollar annual renewal fee as required by subsection 2 of Section 331.050, RSMo 1969.

2. If there are other allegations or complaints which justify disciplinary action against a licensee, the State Board of Chiropractic Examiners must file a complaint with the Administrative Hearing Commission as provided in Section 161.282, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Letter Op. No. 125
3-10-70, Brenton

December 2, 1971

OPINION LETTER NO. 70
Answer by letter-Wood

Honorable Robert A. Young
Senator, District 24
3500 Adie Road
St. Ann, Missouri 63074



Dear Senator Young:

You have requested my opinion on the following questions:

- "1. Can the City of St. Louis divest its ownership of Lambert Field to a City of St. Louis-State of Illinois Joint Airport Authority? Consider the fact that Lambert Field is at its present worth by the use of revenue bonds and revenue bonds may remain outstanding at the time of divestment.
- "2. Can the City of St. Louis issue revenue bonds to build a transportation terminal complex, within its boundaries, which will be owned and operated by a City of St. Louis-State of Illinois Joint Airport Authority?
- "3. Can the City of St. Louis enter into an agreement with the State of Illinois, which will create an authority, which will issue revenue bonds for constructing and improving airport facilities both in the State of Missouri and the State of Illinois?
- "4. May the City of St. Louis, or the mayor or the City of St. Louis and the governor of the State of Illinois, enter into any compact, part of the arrangement being

Honorable Robert A. Young

turning Lambert Field over to a joint St. Louis-Illinois Airport Authority, once a new airport is built, without permission of the Missouri Legislature or a vote of the people. If a vote of the people is required, would this require a vote of all of the people of Missouri or a vote only of the people of the City of St. Louis."

The opinion in Dysart v. City of St. Louis, 11 S.W.2d 1045 (Mo. banc 1928) states that at the primary election on August 7, 1928, the citizens of St. Louis approved the issue of bonds in the sum of \$2,000,000 for the acquisition, improvement and development of an airport. The transcript filed with the Supreme Court in that case reflects that these were general obligation bonds.

The transcript filed with the Supreme Court in the case of McDonnell Aircraft Corp. v. City of Berkeley, 367 S.W.2d 498 (Mo. 1963) reflects that, as of 1960, the total investment of the City of St. Louis in Lambert-St. Louis Municipal Airport was \$21,000,000 which sum was derived from the sale of general obligation bonds (\$16,000,000) and from the sale of an aircraft assembly and testing plant to McDonnell Aircraft Corporation. This record also reflects that, as of 1960, the voters of the City of St. Louis had approved a revenue bond issue of \$10,000,000 to be used exclusively for airport purposes.

We understand your first question to inquire if the City of St. Louis can terminate its sole ownership of Lambert Airport in favor of a joint ownership of the airport by the State of Illinois and the City of St. Louis so long as revenue bonds of the City of St. Louis used to extend or improve Lambert Airport remain outstanding.

Our Opinion No. 504 to you on December 16, 1970, expressed the view that Article VI, Section 27 of the 1945 Constitution conditions the use of municipal revenue bonds for an airport upon the exclusive ownership of the airport by the municipality. It appears and we assume it to be a fact that the City of St. Louis has sold its revenue bonds and used the proceeds for development of Lambert Airport subsequent to the adoption of Article VI, Section 27 in 1945. We are therefore of the opinion that the City of St. Louis must exclusively own Lambert Airport.

Your second question is whether the City of St. Louis can issue revenue bonds for construction of a transportation terminal complex that will be jointly owned and operated by a City of St. Louis-State of Illinois Joint Airport Authority. We think it can only be logically concluded that a "transportation terminal complex" owned and operated by an airport authority is within the

Honorable Robert A. Young

meaning of the constitutional term "airport" as used in Article VI, Section 27, and we are accordingly of the opinion that such a complex, so financed, must likewise be entirely owned by the City of St. Louis.

Your third question is whether the City of St. Louis and the State of Illinois can, by agreement, create an authority, and issue revenue bonds in the name of the authority for constructing and improving airport facilities owned by the authority in the States of Illinois and Missouri.

The Board of Alderman of the City of St. Louis ". . . may vest jurisdiction for the construction, improvement, equipment, maintenance, and operation . . . [of an airport] in any suitable officer, board or body of such city, . . ." (Section 305.210, RSMo 1969). The board may also ". . . contract and cooperate . . . with other states . . . for the planning, development, construction, acquisition or operation of any public improvement or facility . . . [if] the subject and purposes of any such contract or cooperative action . . . [is] within the scope of the powers of . . . [the City of St. Louis] . . ." (Section 70.220, RSMo 1969; and see Section 305.170, RSMo 1969). Since it is not within the scope of the powers of the City of St. Louis to use the proceeds of its revenue bonds for an airport not entirely owned by the city, we do not believe the city can contract or cooperate with the State of Illinois for the planning, development, construction, acquisition or operation of jointly owned airport facilities that are to be funded to any extent by revenue bonds of the City of St. Louis.

Your final question is whether permission of the Missouri legislature or a favorable vote of the people of Missouri or the people of the City of St. Louis is a necessary condition to the transfer by the City of St. Louis of ownership and control of Lambert Airport to a joint St. Louis-State of Illinois Airport Authority. It is our opinion that the City of St. Louis may not with or without a referendum so divest itself of sole ownership of Lambert Airport because the airport was procured, at least in part, through revenue bonds of the city authorized by Article VI, Section 27, Constitution of Missouri, 1945.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

January 21, 1971

OPINION LETTER NO. 71

Mr. J. E. Riney, Chairman
State Tax Commission
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Riney:

This is in response to your request for an opinion concerning the legality of assessing summer homes, camps, cottages, or other structures erected on grounds leased from the United States government. Specifically, you have asked whether the owners of structures erected on land owned by the United States government pursuant to the Flood Control Act (33 U.S.C.A. §701, et. seq.) under a long term lease arrangement should be assessed for the value of such structures in the manner as prescribed for assessing all other real and personal property and whether such assessment should be entered on the real book as improvements on government leased ground.

Of course, inasmuch as title to the land is in the United States, no tax can be imposed upon it. See Article III, Section 43, Constitution of Missouri. However, the Missouri Supreme Court has held that the interest of a private corporation in a structure erected by that corporation pursuant to a lease with the Army on land owned by the United States is subject to local taxation. See State ex rel. Benson v. Personnel Housing, Inc., 300 S.W.2d 506 (Mo. 1957). The court determined that such property should be taxed as real estate. State ex rel. Benson v. Personnel Housing, Inc., *id.*, at page 510. In Iron County v. State Tax Commission, 437 S.W.2d 665, 668 (Mo. banc 1968), the court again affirmed that privately held possessory interests, such as those created by lease in publicly owned property are subject to tax, notwithstanding the exemption of publicly owned property. Referring to the Personnel Housing case, the court stated:

" . . . This decision is authority both for the proposition that a leasehold interest is real

Mr. J. E. Riney

property for purposes of taxation and that the exemption accorded the Government from taxation thereon does not extend to a privately owned leasehold in that real estate." Iron County v. State Tax Commission, id. at page 669

Also, enclosed is a copy of an opinion issued August 14, 1961, to the Honorable Clarence H. Overbay, Jr., which holds that a lessee's leasehold interest may be assessed separately as realty.

Therefore, it is our opinion that summer homes, camps, cottages, or other structures erected on land owned by the United States government pursuant to the Flood Control Act under a lease arrangement should be assessed to the private owners of such structures as real property.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 68
8-14-61, Overbay

WORKMEN'S COMPENSATION:

The State of Missouri is required to be a self-insurer with respect to employees of the Division of Mental Health under the Workmen's Compensation Law.

OPINION NO. 72

February 23, 1971

Honorable Edna Eads
State Representative
District No. 149
Room 203, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Eads:

This opinion is in response to your letter inquiring:

"In the field of Mental Health, can Workmen's Compensation Insurance be provided by any other means than self-insured?"

Section 202.024, RSMo 1969, states in part as follows:

"1. The provisions of chapter 287, RSMo, governing workmen's compensation are extended to include all employees and authorized student and volunteer workers of the division [of Mental Health]. The state of Missouri shall be a self-insurer and assume all liability imposed by chapter 287, RSMo, in respect to such personnel of the division, without insurance and the attorney general shall appear on behalf of and defend the state in all actions brought by such personnel of the division under the provisions of the workmen's compensation law."

This section was revised in 1969 to include student and volunteer workers, otherwise, the sense of the section was not

Honorable Edna Eads

changed from the law as previously enacted in 1957.

Section 105.810, RSMo 1969, states:

"The provisions of chapter 287, RSMo, governing workmen's compensation are extended to include all state employees. The state of Missouri shall have the option to become a self-insurer and assume all liability imposed by chapter 287, RSMo, or to purchase insurance in companies licensed to write workmen's compensation insurance in this state and if the state elects to self-insure, the attorney general shall appear on behalf of and defend the state in all actions brought by state employees under the provisions of the workmen's compensation law."

Section 105.820, RSMo 1969, provides:

"The head of each executive department and constitutional agency and in the case of the judicial branch of the government the chief justice of the supreme court, and in the case of the legislative branch of the government the president pro tem of the senate and the speaker of the house of representatives acting together, shall exercise the option to insure or self-insure in the best interest of the state and shall perform such duties as may be necessary or incidental to carry out effectively the purposes of sections 105.800 to 105.850."

Section 105.830, RSMo 1969, provides:

"Nothing in sections 105.800 to 105.850 shall affect any department or constitutional agency which is already under the provisions of chapter 287, RSMo, but every employee of each department and agency shall be covered by the provisions of chapter 287, RSMo."

The Department of Public Health and Welfare is a department of state government and is composed of three divisions, one of which is the Division of Mental Health, Section 191.010, RSMo 1969, and accordingly, any legislation that would affect a division of the department would also affect the department.

Honorable Edna Eads

In view of contradictory language between Section 202.024 and Sections 105.810 and 105.820, we endeavored to determine whether Sections 105.810 and 105.820 supersede Section 202.024 with respect to the right of the state to purchase insurance to provide workmen's compensation coverage for employees of the Division of Mental Health. In this connection, we also considered the effect of Section 105.830 on the operation of Section 105.810 and 105.820 with respect to Section 202.024.

Section 202.024 locked the Division of Mental Health into a plan of workmen's compensation coverage with the State of Missouri as self-insurer. The revision of Section 202.024 in 1969 did not release the division from this obligation of self-insurance by the state.

Section 105.810 extended Chapter 287, RSMo to include all state employees and gave to the State of Missouri the option to self-insure or to purchase insurance and, Section 105.820 granted the right to exercise this option in the best interests of the state to the head of each executive department and constitutional agency, Chief Justice of the Supreme Court, President Pro Tem of the Senate and Speaker of the House of Representatives.

The wordage of Sections 105.810 and 105.820 indicate an intention of inclusiveness in granting this right to exercise the option to insure or self-insure. However, there is no reference therein to Section 202.024, and any thought that Sections 105.810 and 105.820 supersede Section 202.024 with respect to releasing the Division of Mental Health from the statutory obligation of self-insurance by the state is dispelled by the clear language of Section 105.830 that "Nothing in Section 105.800 to 105.850 shall affect any department or constitutional agency which is already under the provisions of chapter 287, RSMo, . . ." This conclusion is also supported by the revision of Section 202.024 in 1969 by the Seventy-fifth General Assembly of Missouri without releasing the Division of Mental Health from the statutory requirement of self-insurance.

CONCLUSION

Therefore, it is the opinion of this office that the State of Missouri is required to be a self-insurer with respect to employees of the Division of Mental Health under the Workmen's Compensation Law.

Very truly yours,



JOHN C. DANFORTH
Attorney General

COUNTY COURT:
CITIES, TOWNS & VILLAGES:
INCORPORATION OF CITIES:

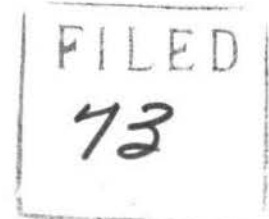
A petition to incorporate a city
or town under Section 72.080, RSMo
1969, may be filed at any time but
a city or town may not be incor-

porated under this section unless and until the county court is
satisfied that the petition is signed by a majority of the taxable
inhabitants at the time the town or city is declared to be incor-
porated.

OPINION NO. 73

February 11, 1971

Honorable William Raisch
Representative, District 48
Room 236D, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Raisch:

Your request for an opinion presents the question whether
under Section 72.080, RSMo 1969, a petition to incorporate a city
or town must be presented to the county court within a certain
time after the signatures are placed on the petition.

Section 72.080, RSMo 1969, is as follows:

"Any city or town of the state not incorporated
may become a city of the class to which its
population would entitle it under this chapter,
and be incorporated under the law for the gov-
ernment of cities of that class, in the fol-
lowing manner: Whenever a majority of the in-
habitants of any such city or town shall present
a petition to the county court of the county
in which such city or town is situated, setting
forth the metes and bounds of their city or
town and commons and praying that they may be
incorporated, and a police established for their
local government, and for the preservation and
regulation of any commons appertaining to such
city or town, and if the court shall be satis-
fied that a majority of the taxable inhabitants
of such town have signed such petition, the
court shall declare such city or town incor-
porated, designating in such order the metes
and bounds thereof, and thenceforth the inhabi-
tants within such bounds shall be a body poli-
tic and incorporate, by the name and style of
'the city of, or 'the town of,

Honorable William Raisch

and the first officers of such city or town shall be designated by the order of the court, who shall hold their offices until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified."

In this statute, the legislature has set out the conditions upon which cities and towns may be incorporated in their respective classes. It is the duty of the county court to see that these conditions are met. The authority of the county court to declare a city or town incorporated is conferred only ". . . Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, . . ."

It is apparent, therefore, that a petition would not have operative effect under Section 72.080 unless and until it is presented to the county court. It is equally apparent that the presentation of the petition to the county court is a condition precedent to the vesting of jurisdiction in the county court to declare a city or town incorporated under this statute.

With respect to the timeliness of the presentation of the petition, the statute provides that the county court ". . . shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, . . ."

It appears, therefore, that a petition to incorporate a city or town under Section 72.080, RSMo 1969, must be signed by persons who are taxable inhabitants at the time the city or town is declared to be incorporated.

In *In re City of Uniondale*, 225 S.W. 985, 987 (Mo. 1920), the Supreme Court of Missouri stated the law as follows:

"The procedure prescribed is brief and simple:

'Whenever a majority of the inhabitants
* * * shall present a petition to the county
court, * * * praying that they may be incor-
porated, * * * if the court shall be satisfied
that a majority of the taxable inhabitants
* * * have signed such petition, the court shall
declare such city or town incorporated. * * *'

No notice of any kind is required. It is not necessary that the petition shall have been on file for any length of time, or even that it

Honorable William Raisch

shall have been filed at all, before being taken up for consideration by the court. Upon its presentation the court may immediately proceed to determine whether it is signed by a majority of the taxable inhabitants, and, if it is satisfied that such is the case, may make its order of incorporation without further ado. Not only, therefore, is notice not required, but the statute does not contain the slightest implication that the taxable inhabitants of the territory sought to be incorporated, who do not sign the petition, may appear and contest it. . . ."

Also, In re City of Duquesne, Missouri, 313 S.W.2d 65, 71 (Spr.Ct.App. 1958), the court stated:

"The county court is the agency through which legislative authority to establish municipalities is provided. It can only ascertain the facts required by the statute. § 72.080 RSMo 1949, V.A.M.S., provides what facts the county court must find in ordering the incorporation of a city of the fourth class. The statute states that any unincorporated city or town may file a petition with the court. The Uniondale case specifically says that all that is required is that a petition be filed setting out the metes and bounds of the proposed incorporation and the commons, signed by a majority of the taxpaying citizens. And if the county court finds such facts, it is mandatory that the court incorporate the town. . . ."

It appears, therefore, that the statute has not prescribed any time limit for presentation of the petition to the county court after the signatures have been placed on the petition.

CONCLUSION

It is, therefore, the opinion of this office that a petition to incorporate a city or town under Section 72.080, RSMo 1969, may be filed at any time but a city or town may not be incorporated under this section unless and until the county court is satisfied that the petition is signed by a majority of the taxable inhabitants at the time the town or city is declared to be incorporated.

Honorable William Raisch

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, reading "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

February 1, 1971

OPINION LETTER NO. 75



Mr. Joseph Jaeger, Jr.
Director of Parks
State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

You have requested my formal opinion as to what constitutes the corpus of the Dr. Edmund A. Babler Memorial State Park Fund.

Sections 253.350 and 253.360, RSMo (L. 1965, p. 387, approved June 18, 1965) created the above named fund to be composed of the following:

"1. All personal and real property bequeathed or devised to the state of Missouri for the benefit of the Doctor Edmund A. Babler memorial state park under the will of Jacob L. Babler and all other personal and real property acquired through any grant, gift, donation, devise, or bequest to or for the use of the state of Missouri for such purpose . . ."

Subsection 3 of Section 253.360, RSMo, provides:

"3. The Missouri state park board is authorized to use the income of the fund created by this section for the purposes for which the fund is dedicated and, in addition, may expend annually an amount equal to seven and one-half percent of the corpus of the fund for the same purposes. Such amounts shall be subject to appropriation by the general assembly."

Mr. Joseph Jaeger, Jr.

According to the opinion in *Mercantile Trust Company National Association v. Jaeger*, 457 S.W.2d 727, 729 (Mo. banc 1970), the testamentary trust established by the will of Jacob Babler terminated in May 31, 1965, at which time "the value of the trust estate, corpus, and unexpended income was \$2,724,714.27.", which estate by the terms of the will, was to be delivered to the State Treasurer for use and expenditure by the State Park Board on Babler Memorial State Park.

The will of Jacob Babler authorized the testamentary trustees to expend all or any part of the net income of the trust estate and not to exceed seven percent of the annual book value of the corpus of the trust estate upon the improvement of Babler Memorial State Park (*Mercantile Trust Company National Association v. Jaeger*, supra, l.c. 728). We assume that this provision of the will motivated the enactment of Subsection 3 of Section 253.360, RSMo, which permits the General Assembly to appropriate all income, and seven and one-half percent annually of the corpus of the Babler Fund to the State Park Board for the maintenance and development of Babler Memorial State Park.

The distinction between corpus or principal and income or interest is normally meaningful only in a trust situation, and particularly in a trust where the beneficial interest in the estate is divided between two or more persons, typically a life tenant and a remainderman. The Dr. Edmund A. Babler Memorial State Park Fund is not a "trust," for all interests in the assets of the fund, nominal and beneficial, present and future, are vested in the same person, to-wit: the State of Missouri (*Peugnet v. Berthold*, 81 S.W. 874 (Mo. 1904)).

" . . . Since every valid trust must have a trustee who is not the sole beneficiary, it is undoubtedly true that the same person cannot be at the same time sole trustee and sole beneficiary of the same interest, or, in other words, that a trust cannot exist where the legal and beneficial interests are in the same person; . . ." (90 C.J.S., Trusts, §210, page 138)

"Likewise, 'if the legal title to the trust property and the entire beneficial interest become united in one person who is not under an incapacity, the trust terminates.' . . ." (*Thomson v. Union National Bank in Kansas City*, 291 S.W.2d 178, 182 (Mo. 1956))

Mr. Joseph Jaeger, Jr.

However, because the legislature was probably influenced by the Jacob Babler testamentary trust in enacting Section 253.360(3), RSMo, we believe it appropriate to apply trust principles in interpreting this section.

"Corpus" is generally defined as the principal sum or capital, as distinguished from interest or income (Black's Law Dictionary, Fourth Edition, page 413). Trust income is ordinarily the net income which the corpus of the trust actually earns (Gardner v. Bernard, 401 S.W.2d 415, 422 (Mo. 1966)).

"In general, the capital, corpus, or principal of the trust estate includes not only the property which originally comes into the trustee's hands, but its increase or enhancement in value, unless the instrument or the statute creating the trust evinces an intention to the contrary; and the capital or corpus also includes whatever subsequently takes the place of the original property and represents it.
. . .

"As distinguished from capital, income represents the earnings of the trust property; it embraces only the net profits after deducting all necessary expenses and charges. . . .

* * *

"Where stock, bonds, or other property belonging to the trust estate are sold, the money received, including profits, if any, ordinarily constitutes a part of the corpus, or principal, of the estate, and not income, unless the trustor has, by unmistakable language, directed otherwise; . . ." (90 C.J.S., Trusts, §355, pages 642-644, 646-647)

In ruling that stock dividends, as opposed to cash dividends, ordinarily belong to the corpus of a trust, the Supreme Court of Missouri gave this definition of corpus and income:

"What is the principal or corpus of the estate in cases of this kind? Is it the corporate stock, itself, or its value at a given time? Undoubtedly the former. If the trust asset were land, the fact would be clear. With reference to stock, the same view is taken in other phases of trust administration, even in

Mr. Joseph Jaeger, Jr.

those states following the Pennsylvania or Kentucky rule. For instance, it is uniformly conceded that, if corporate stock, so held in trust, increase in value through the accumulation of corporate earnings after the beginning of the trust, and if no dividends are declared, the whole increase belongs to corpus, even upon a sale of the stock. . . .

* * *

"The basis of our ruling in this case is that the stock dividends were not income of the trust estate but an accretion to the corpus because of their nature and because they represent no money or property severed from capital assets. The converse of that ruling would be that money or property which is severed from corporate assets by appropriate action of the governing body of the corporation and paid as dividends, would be income; . . ." (Hayes v. St. Louis Union Trust, 298 S.W. 91, 97, 99 (Mo. 1927))

The proceeds from the sale of real estate constituting trust assets are principal and not income of the trust (Lang v. Mississippi Valley Trust Co., 223 S.W.2d 404, 405-406 (Mo. 1949)). As ruled by Hayes v. St. Louis Union Trust, supra, stock dividends are generally allocable to the trust principal, but if the trustee, as the shareholder, has the option of receiving the dividend in the form of stock or cash, the dividend is allocable to income regardless of its form (Coates v. Coates, 304 S.W.2d 874 (Mo. 1957)). Rents and royalties are generally considered income (51 Am.Jur.2d, Life Estate and Remainderman, §§130, 153-156). Hayes v. St. Louis Union Trust, supra, also ruled that the increase in value of corporate stock held in trust by reason of accumulation of corporate earnings is allocable to corpus, even upon a sale of the stock. The gains in value of investment bonds also belong to trust corpus (Mercantile-Commerce Bank & Trust Co. v. Morse, 201 S.W.2d 915, 922 (Mo. 1947)). Excess income may become assets of the trust to be added to the corpus and invested as part of the corpus (St. Louis Union Trust Co. v. Bethesda General Hospital, 446 S.W.2d 823, 829 (Mo. 1969)). We believe that income of the Babler Fund not appropriated by the legislature should be considered excess income and thereafter treated as corpus.

In summary, it is our opinion that the corpus of the Dr. Edmund A. Babler Memorial State Park Fund, within the meaning of Section

Mr. Joseph Jaeger, Jr.

253.360(3), RSMo, includes all assets of whatever character delivered by any person to the State of Missouri for the benefit of the Babler Memorial State Park, and includes the increase in value of such assets, and the conversion of all assets through sale, purchase, or exchange, into other assets. It is our opinion that income of the fund, within the meaning of Section 253.360(3), RSMo, includes all interest, rents and royalties, cash dividends, and stock dividends where received in lieu of cash dividends at the option of the stockholder (i.e., the State Treasurer and the Missouri State Park Board; Section 253.360(4), RSMo).

Since the legislature appropriates annually or biennially for fiscal years commencing on July 1 (Article IV, Section 23, Constitution of Missouri, 1945), we believe it most logical to determine annual income and corpus value of the Babler Fund on the same fiscal year basis. This would necessarily have to be fiscal years that have elapsed prior to the appropriation, and following an appropriation based on the value of income and corpus for a particular fiscal year, that fiscal year would not again be considered for purposes of Section 253.360(3), RSMo. If the legislature does not appropriate the full income derived from the fund assets during a particular fiscal year, this remaining income should thereafter be considered and treated as corpus of the fund.

Because the Babler Fund is not a trust, and hence there are no separate and competing interests of different persons in the fund, we have difficulty perceiving the justification for Section 253.360(3), RSMo, particularly in view of the mechanical difficulties inherent in its application (i.e., segregation of income and corpus; annual valuations of corpus and income). We would recommend that the Missouri State Park Board seek amendment of Section 253.360(3), RSMo, so that it would read:

"The Missouri State Park Board is authorized to use the assets of the fund in such amounts as may be appropriated according to law for the purposes of maintaining and developing the Dr. Edmund A. Babler Memorial State Park."

Yours very truly,

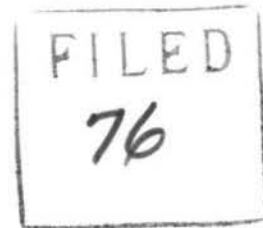
JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

January 13, 1971

OPINION LETTER NO. 76

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have requested a formal opinion as to the correct disposition of interest earned on the Dr. Edmund A. Babler Memorial State Park Fund (Section 253.360, RSMo). The interest earned on such fund is being credited by the state treasurer to general revenue pursuant to Section 30.240, RSMo.

Article IV, Section 15, Constitution of 1945, provides in part:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. . . ."

The Constitution is thus silent on the question raised by you, and the answer must be dictated by statute.

Section 30.240, RSMo, provides:

Mr. Joseph Jaeger, Jr.

"The state treasurer shall hold all state moneys, all deposits thereof, time as well as demand, and all obligations of the United States government in which such moneys are placed for the benefit of the respective funds to which they belong and disburse the same as authorized by law. All yield, interest, income, increment, or gain received from the time deposit of state moneys or their investment in obligations of the United States government shall be credited by the state treasurer to the general revenue."

This law was originally enacted in 1879 (L. 1879, p. 236), and received its present form in 1957 (L. 1957, p. 485). Prior to 1957, the law provided that:

". . . interest and profits as may accrue thereon, shall be disbursed by said treasurer for the purposes of the state according to law upon warrants signed by the state auditor and not otherwise; . . ." (Section 30.240, RSMo 1949)

The last sentence of the present law, providing that interest shall be credited to general revenue, would seem to be more of a change in form, rather than substance.

Section 253.360(1), RSMo, provides:

"There is hereby created the 'Doctor Edmund A. Babler Memorial State Park Fund'. All money, funds, and securities acquired as provided in section 253.350 shall be deposited with the state treasurer to the credit of the fund. All income, interest, rights or rent earned through the operation of the funds shall also be credited to the fund."

This law was first enacted in 1965 (L. 1965, p. 387) and has not been subsequently amended. The last sentence, in providing that interest earned on the fund shall be credited to the fund, is obviously inconsistent with the last sentence of Section 30.240, RSMo. In this circumstance, the earlier and general law, Section 30.240, RSMo, must yield to the later and specific law, Section 253.360(1), RSMo. (Laughlin v. Forgrave, 432 S.W.2d 308, 313 (Mo. banc 1968)). Therefore, it is our opinion that interest earned

Mr. Joseph Jaeger, Jr.

on the Dr. Edmund A. Babler Memorial State Park Fund should be credited to such fund, and not to general revenue.

Yours very truly,

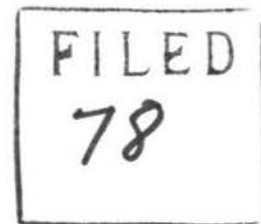
JOHN C. DANFORTH
Attorney General

RETIREMENT:
RETIREMENT SYSTEM:
PENSION:
STATE EMPLOYEES' RETIREMENT
SYSTEM:

Pursuant to the provisions of subsection 3 of Section 104.380, RSMo 1969, an individual electing to retire as a member of the Missouri State Legislature is not entitled to a refund of contributions made by said member as an employee of the state prior to six years service as a member of the legislature.

OPINION NO. 78

May 21, 1971



Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Pursuant to the provisions of Section 104.380, R.S. of Mo., 1969, would a person retiring as a member of the Missouri State Legislature be entitled to a refund of contributions made by said member as an employee of the State prior to his or her service as a member of the Legislature."

In connection with the above, subsection 3 of Section 104.380, RSMo 1969, reads as follows:

"If a member, after serving six or more years as a member of the general assembly, is elected to a state office or is appointed to a state office or employment, he may, at the end of such term or employment, elect to take on retirement the amount which shall be due him for his creditable service as a member of the

Mr. Edwin M. Bode

general assembly or that which would be due him as such officer or employee. If he elects to accept the legislative retirement benefits, the amount of his accumulated contributions to the fund made during such term or employment shall, upon written application, be refunded to him."

It is our understanding that the individual in question was employed by the State Department of Revenue from January of 1959 until December of 1962. During this time, he paid in the normal amount toward his retirement. Thereafter, he commenced his duties as a member of the General Assembly and served from January, 1963 until January 1971. It is submitted that the issue for consideration is the interpretation of the statutory phrase "After serving six or more years as a member of the general assembly." Is a person retiring as a member of the Missouri State Legislature entitled to a refund of contributions made by said member as an employee of the State prior to six years service as a member of the general assembly?

House Bill No. 33 of the Seventy-fourth General Assembly repealed Section 104.380, RSMo 1959 relating to the State Employees Retirement System and enacted in lieu thereof one new section to be known as Section 104.380, relating to the same subject matter and specifically including subsection 3 of Section 104.380, RSMo. Under this statutory provision, an individual after serving six or more years as a member of the general assembly and who then subsequently works for the state in another capacity, may, if he elects to retire as a member of the general assembly, receive the amount of his accumulated contributions to the fund for the period of subsequent state employment. However, there is authority for the proposition that where statutes are plain, unambiguous, and simple, there is no room for construction and they must be applied by courts as they are written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. 1964). Therefore, it is our view that the language of the statute clearly and unambiguously provides that an individual electing to retire as a member of the general assembly may receive a refund of his contributions only when a member is elected to a state office or is appointed to a state office or employment after he has served six or more years as a member of the general assembly.

CONCLUSION

It is the opinion of this office that pursuant to the provisions of subsection 3 of Section 104.380, RSMo 1969, an individual electing to retire as a member of the Missouri State Legislature is

Mr. Edwin M. Bode

not entitled to a refund of contributions made by said member as an employee of the state prior to six years service as a member of the legislature.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in cursive script, reading "John D. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN D. DANFORTH
Attorney General

COUNTY PURCHASES:
COUNTY CONTRACTS:

Section 50.660, RSMo 1969, which requires the solicitation of bids for certain county purchases applies to third class counties.

OPINION NO. 80

June 23, 1971



Honorable Lowell McCuskey
Prosecuting Attorney
Osage County
Osage County Court House
P. O. Drawer L
Linn, Missouri 65051

Dear Mr. McCuskey:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Does Section 50.660, RSMo, as amended by H. B. 205, Laws of Missouri 1965, page 155, now apply to counties of the third class, such as Osage County?"

Section 50.660, RSMo 1969, reads as follows:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment or services other than personal made by the officer in charge of purchasing in any county having the officer. No contract or order imposing any financial obligation on the county is binding on the county unless it is in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation

to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating; except that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it is sufficient for the accounting officer to certify that the bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of the bonds yet to be sold or of the taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse. It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment or services other than personal therein described, in the quantities required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for supplies, ma-

Honorable Lowell McCuskey

materials, equipment or services other than personal shall bear the certification. In case of such contract no financial obligation accrues against the county until the supplies, materials, equipment or services other than personal are so ordered and the certificate furnished."

Briefly, the above statute pertains to the advertisement for bids for county purchases. It provides in part that all contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition. It is further provided that it is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days.

Prior to the adoption of House Bill 205, subsection 2 of Section 50.525, RSMo 1959, reads as follows:

"2. Sections 50.540 to 50.660 apply to counties of classes one and two and sections 50.670 to 50.740 apply to counties of classes three and four."

Therefore, it was clear that Section 50.660, RSMo 1959, pertaining to the advertisement for bids for county purchases did not apply to third class counties.

However, with the passage of House Bill 205 by the Seventy-third General Assembly, Section 50.525, RSMo 1969, presently reads as follows:

"Sections 50.525 to 50.745 may be cited as 'The County Budget Law'."

In addition, Section 50.530, RSMo 1969, reads in part as follows:

"As used in sections 50.530 to 50.745,

"(1) 'Accounting officers' means county auditor in counties of classes one and two and the county clerks in counties of classes three and four; . . ."

In this connection, Section 50.660, RSMo 1969, specifically provides that no contract imposing any financial obligation on the county is binding unless the contract or order bears the certification of the accounting officer so stating.

Honorable Lowell McCuskey

The basic rule in the construction of statutes is to discover the lawmakers' intention and if possible to effectuate that intention and thereby attain the object and purpose of the statute. Hern v. Carpenter, 312 S.W.2d 823 (Mo. 1958). In this connection, the following comment was made in the case of State v. Mosman, 315 S.W.2d 209 (Mo. 1958) at page 211:

" . . . 'When called upon to construe a statute, the court's prime duty is to give effect to the legislative intent as expressed in the statute. To this end we are guided by certain well established and recognized rules, among which are the following: (a) The object sought to be obtained and the evil sought to be remedied by the Legislature; (b) the legislative purpose should be assumed to be a reasonable one; (c) laws are presumed to have been passed with a view to the welfare of the community; (d) it was intended to pass an effective law, not an ineffective or insufficient one; (e) it was intended to make some change in the existing law. Warrington v. Bobb, Mo.App., 56 S.W.2d 835, 837; 82 C.J.S. Statutes § 316, pp. 544, 545. . . ." (Emphasis added)

Therefore, it is our view that the legislature by the passage of House Bill 205 intended that the existing law be changed so that Section 50.660, RSMo would apply to all counties and not just to counties of classes one and two.

In this regard, it was held in an opinion of the Attorney General No. 188, Short, March 29, 1971, that Section 50.600, RSMo 1969, applies to third class counties and that third class counties are thereby required to have at least one public hearing on their proposed budgets. The reasoning of the opinion is that the legislature intended that Section 50.600, RSMo 1969, apply to all counties and not just to counties of classes one and two as a result of the repeal and reenactment of Section 50.525, RSMo 1969, which is now expressly referred to as "The County Budget Law" (copy of opinion attached). It is submitted that similar reasoning is applicable to your opinion request.

CONCLUSION

It is the opinion of this office that Section 50.660,

Honorable Lowell McCuskey

RSMo 1969, which requires the solicitation of bids for certain county purchases applies to third class counties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

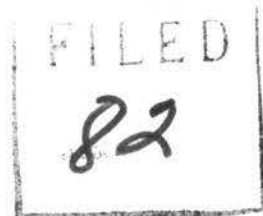
Op. No. 188
3-29-71, Short

Answer by Letter (Burns)

January 5, 1971

OPINION LETTER NO. 82

Honorable C. M. Bassman
Representative, District 106
Room 202H, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bassman:

This is in answer to your letter of recent date in which you state that the people of Hermann, Missouri plan to establish a museum in which will be displayed articles relating to the prohibition era including whiskey stills and parts of stills, the components of which will have holes or parts missing or which will be otherwise rendered unfit to be used for the production of whiskey or other intoxicating beverages.

It is our view that no state law would be violated if such a display were made in a museum.

Section 311.810, RSMo 1969, makes contraband certain equipment used or fit for use in the unlawful manufacture of intoxicating liquor.

It is clear from the facts set out in your letter that the various objects which will be displayed in the museum will not be used or be fit for use in the unlawful manufacture of intoxicating liquor.

Therefore, there will be no violation of any state law by such display.

Very truly yours,

JOHN C. DANFORTH
Attorney General

COMPENSATION:
COUNTY TREASURER:

The county treasurer in a third class county not under township organization is entitled to the additional compensation provided for in Section 54.275, RSMo 1969, in addition to the compensation provided for under Section 54.260, RSMo 1969.

OPINION NO. 85

February 5, 1971

Honorable James Millan
Prosecuting Attorney
Pike County Court House
Bowling Green, Missouri



Dear Mr. Millan:

In your letter of December 29, 1970, you requested an opinion from this office as follows:

"I have been requested by our County Court and County Treasurer to request an opinion with respect to compensation for the County Treasurer. Of course, Section 54.260 which was adopted in 1969 provides for the general salary for the County Treasurer.

"However, I call to your attention Section 54.275 which provides for additional compensation for the Treasurer in the handling of intangible tax returns and reporting new names to the Department of Revenue.

"My question is, is the County Treasurer to receive the additional compensation provided for under Section 54.275 in addition to the compensation provided in Section 54.260, in the event the County Treasurer performs the additional duties set forth in Section 54.275?

"In the event you already have such an opinion you may simply send me a copy of one previously entered. If not, may I have a new opinion on this matter."

Pike County is a third class county.

Section 54.260, RSMo 1969, provides:

Honorable James Millan

"The county treasurers in counties of the third class of this state, except counties under township organization, shall receive for their services annually the following sums: In counties having less than seven thousand five hundred inhabitants, the sum of four thousand five hundred dollars; in counties having more than seven thousand five hundred inhabitants and less than ten thousand, the sum of four thousand six hundred dollars; in counties having more than ten thousand inhabitants and not more than twelve thousand five hundred, the sum of four thousand seven hundred dollars; in counties having more than twelve thousand five hundred inhabitants and not more than fifteen thousand, the sum of five thousand dollars; in counties having more than fifteen thousand inhabitants and not more than twenty thousand, the sum of five thousand four hundred dollars; in counties having more than twenty thousand inhabitants and not more than thirty thousand, the sum of five thousand seven hundred dollars; in counties having more than thirty thousand inhabitants but not more than thirty-five thousand, the sum of five thousand nine hundred and fifty dollars; in counties having more than thirty-five thousand inhabitants but not more than forty thousand, the sum of six thousand four hundred dollars; and in counties having more than forty thousand inhabitants, the sum of six thousand seven hundred dollars."

Section 54.275, RSMo 1969, provides:

"For the additional duties imposed upon county treasurers by section 146.056, RSMo, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurer shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the director of revenue:

(1) In class four counties six hundred dollars per annum.

Honorable James Millan

(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.

(3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.

(4) In class three counties having a population of more than thirty thousand, one thousand dollars.

(5) In class two counties, one thousand dollars.

(6) In counties under charter form of government a compensation to be fixed by the county council."

Section 54.275, supra, was enacted in 1951, Laws of 1951, page 867 and has been in its present form since that date.

Section 54.260, RSMo 1959, provided that county treasurers in counties of the third class should receive for their services annually compensation based upon the population of the counties with the further proviso as follows:

" . . . The salaries are in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind."

Section 54.260, RSMo 1959, which contained the above proviso, was repealed by the 71st General Assembly, 1961, House Bill No. 521, Laws 1961, page 289, and was reenacted by providing for an increase in salaries for each county treasurer as stated therein. However, the new section as enacted omitted that provision which stated that the salaries as stated therein would be in lieu of all other or additional compensation.

The cardinal rule of statutory construction is to ascertain the intention of the legislature and as far as possible give effect to the intention as expressed, Household Finance Corporation v. Robertson, 364 S.W.2d 595. In construing a statute repealing one statute and substituting another, the court must assume that the legislature intended something by the repeal of the old and enactment of another in lieu of the other, Darrah v. Foster, 355 S.W.2d 24.

Honorable James Millan

It is the opinion of this office that when the General Assembly in 1961 repealed Section 54.260, RSMo 1959, which provided that the salaries stated therein were in lieu of all other or additional compensation, and enacted a new section providing for an increase in salary but omitting the provision that such salaries were in lieu of all other or additional compensation, the legislature intended that the salaries as stated therein should not be exclusive of all other or additional compensation provided by law, and that the county treasurers would be entitled to the additional compensation provided for in Section 54.275, RSMo.

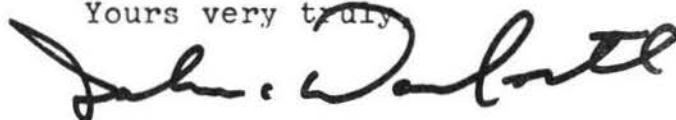
We are enclosing Opinion No. 21 issued by this office on February 21, 1962, holding county treasurers in class three and four counties under township organization are entitled to the additional compensation under Section 54.275, RSMo.

CONCLUSION

It is the opinion of this office that the county treasurer in a third class county not under township organization is entitled to the additional compensation provided for in Section 54.275, RSMo 1969, in addition to the compensation provided for under Section 54.260, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly



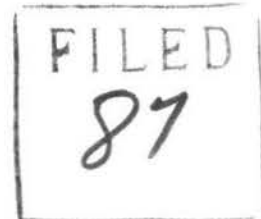
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 21
2-21-62, Leopard

January 28, 1971

LETTER OPINION NO. 87

Honorable James G. Gregory
Prosecuting Attorney
Montgomery County Courthouse
Montgomery City, Missouri 63361



Dear Mr. Gregory:

This is in response to your recent opinion request in which you requested an opinion from this office to the following question:

You state that on April 8, 1970, in the Circuit Court, an eighteen-year-old female defendant entered a plea of guilty to the charge of passing a no-funds check under Section 561.450, RSMo 1969. That after a period of probation, the court under 219.160, RSMo 1969, sentenced the defendant to a period of two years in the State Board of Training Schools.

You ask whether the State is liable for criminal costs incurred in this case.

The State is liable to pay those costs as specified in 550.020, RSMo 1969, which provides as follows:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, work-house or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

Honorable James G. Gregory

The penalty provided in Section 561.450 for conviction thereof is as follows:

" . . . shall be deemed guilty of a felony and upon conviction thereof be punished by imprisonment by the department of corrections for a term not exceeding seven years or by confinement in the county jail for not more than one year or by a fine of not more than one thousand dollars or by both such confinement and fine."

Under Section 550.020 the State is liable for costs in capital cases; in cases where the defendant shall be sentenced to imprisonment in the penitentiary; and in cases "where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment . . . or reform school because such person is under the age of eighteen years. . . ." It is apparent from your inquiry that you are interested only in the application of the third category set forth in Section 550.020. Costs are payable by the State only where the offense is punishable solely by imprisonment in the penitentiary. The penalty provision of Section 561.540 includes penalties other than imprisonment in the penitentiary.

Therefore, the State is not liable for the criminal costs incurred in this matter. Furthermore, you will note that the liability of the State to pay criminal costs in cases where the defendant is imprisoned in an institution other than the penitentiary, arises only where "such person is under the age of eighteen years." Your letter states that the defendant in the instant case is eighteen years of age.

Therefore, it is our conclusion that the Office of the Comptroller was correct in advising that the State is not liable for the criminal costs in the factual situation you describe.

Yours very truly,

JOHN C. DANFORTH
Attorney General

JAILS:
COUNTY COURT:
COUNTY JAILS:

The County Court of Cape Girardeau County may, pursuant to Section 49.310, RSMo, erect a jail at the site referred to as "The Cape Girardeau County Farm" located in the City of Cape Girardeau.

OPINION NO. 88

April 1, 1971

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
225 N. Clark
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"I've recently had an opportunity to read your Opinion No. 505 addressed to the Honorable E. Richard Weber, Prosecuting Attorney of Scotland County. We have a corollary problem in Cape Girardeau County and would appreciate your opinion under the following facts.

"As you know, Cape Girardeau County has two courthouses, one in the County Seat of Jackson which is the Circuit Court, and the Cape Girardeau Court of Common Pleas which is located in the City of Cape Girardeau. Cape Girardeau Court of Common Pleas has limited criminal jurisdiction, and my office does not handle any criminal matters directly in that court. Therefore, the only jail is located in the City of Jackson less than half a block away from the courthouse.

"Our County Court has recently been considering the construction of a new jail, and I have cited to them RSMo. 49.310 which is also cited in your Opinion No. 505 referred to above. Under RSMo. 49.310 it appears that the County Court must erect and maintain 'at the established seat of justice' a jail. In the second sentence in that section, it provides ' . . . and in counties wherein more than one place is provided by law

Honorable A. J. Seier

for holding of court, the County Court may buy and equip and acquire a site and construct a building or buildings to be used as a courthouse and jail . . . ' .

"The question we would like to have an opinion on is whether or not we could construct a jail in Cape Girardeau County on what is commonly called 'The Cape Girardeau County Farm' which is located within the City of Cape Girardeau and is not the established seat of justice so far as criminal cases are concerned? In addition, we'd like to know whether or not a courthouse and jail would have to be combined under the provision in the second sentence of RSMo. 49.310 before such a jail could be constructed within the city limits of Cape Girardeau "

You have made reference to Attorney General Opinion No. 505, October 9, 1970, Webber. Although certain of the statutes cited in that opinion are applicable here, Opinion No. 505 is not.

Such applicable statutes and additional statutes are quoted in pertinent part as follows:

"The county court of any county may acquire by purchase, for the county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary; . . . " Section 49.305, RSMo.

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county; except, that in counties having a special charter, the jail or workhouse may be located at any place within the county. In pursuance of the authority herein delegated to the county courts, the county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip the courthouse and jail, and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip buildings in both places. . . . " Section 49.310, RSMo.

"The county court shall designate the place whereon to erect any county building, on any land belonging to such county, at the established seat of justice thereof." Section 49.370, RSMo.

Honorable A. J. Seier

Thus, jails, with two exceptions, to be noted below, are to be located in each county "at the established seat of justice."

A county's "seat of justice", which is synonymous to the "county seat" is the town where the courthouse and other county buildings are located and which is designated as such under the constitution and statutes of Missouri. Babcock v. Hahn, 75 S.W. 93 (Mo. 1903). The official seat of justice, or county seat, of Cape Girardeau County, as recognized by your letter, is the City of Jackson. Therefore, unless one of the exceptions apply, the jail must be erected in the City of Jackson.

One of the exceptions in Section 49.310 pertains to special charter counties and therefore is not applicable here. The other exception in Section 49.310 is for counties where there is more than one place for holding court. In such counties a jail may be constructed in both places.

Section 480.010, RSMo, provides as follows:

"A court of record, to be called 'The Cape Girardeau Court of Common Pleas', is hereby established within and for the city of Cape Girardeau, in the county of Cape Girardeau, which shall possess all the powers, perform the duties and be subject to the restrictions of a court of record according to the laws of this state."

It is our opinion, therefore, that the County Court of Cape Girardeau County may erect a jail in the City of Cape Girardeau.

You have also asked if the jail would have to be combined in the same building with the courthouse. In our opinion the statutes do not make such a requirement. See Security State Bank v. Dent County, 137 S.W.2d 960 (Mo.1940). Therefore, it is our further opinion that the jail could be erected at the site referred to as "The Cape Girardeau County Farm", which is located in the City of Cape Girardeau.

CONCLUSION

It is the opinion of this office that the County Court of Cape Girardeau County may, pursuant to Section 49.310, RSMo, erect a jail at the site referred to as "The Cape Girardeau County Farm" located in the City of Cape Girardeau.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

June 23, 1971

OPINION LETTER NO. 89

Answer by letter-Park

Honorable John J. Johnson
Member, Missouri Senate
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Johnson:

This letter is written in response to your request for an official opinion concerning the City of St. Louis Earnings Tax. More specifically, the questions presented are as follows:

"Must the City of St. Louis have a population of 700,000 in order to levy the St. Louis City Earnings Tax? Can the City collect the tax if the population drops below this figure? If this tax is legal, can a St. Louis County resident vote if the city decided to have an election on a tax increase?"

The first two questions appear to be moot in view of action taken by the legislature in House Bill No. 154, 76th General Assembly, which was approved by the Governor, June 8, 1971. Such bill contained an emergency clause and under the provisions of Section 29 of Article III of the Missouri Constitution it became effective the date it was approved by the Governor. As you may know, this statute specifically provides that once a city, not located in a county, has come under the operation of such a law, (based upon specified population), a subsequent loss of population will not remove that city from the operation of that law. We believe this newly enacted statute supplies the answers to the first two questions raised by your letter.

With respect as to whether a St. Louis County resident may vote in a city election on a tax increase, Article VI, Section 32(a) of the Constitution of Missouri provides that only qualified voters of the City of St. Louis can vote in city elections for

Honorable John J. Johnson

amendment of the charter. Additionally, we are enclosing herewith Attorney General Opinion No. 252, rendered to R. D. Rodgers, May 2, 1968, holding that a city charter may not be amended to provide for an earnings tax in excess of the amount authorized by the enabling legislation of the Missouri General Assembly.

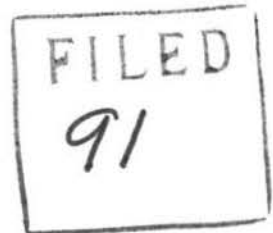
Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 252
5-2-68, Rodgers

May 26, 1971

Answered by Letter - Bartlett
OPINION LETTER NO. 91



Honorable William E. Robinson
State Treasurer
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Robinson:

This letter is in response to your request for the official opinion of this office on the following question:

"We are enclosing copies of correspondence and stipulation agreement pertaining to disposition of \$50,000 set aside as a 'reserve against attorney's fees and expenses of the Trustees and costs of court' in the Babler Trust litigation.

"Since the Supreme Court order of September 16, 1970 ended the litigation in the above case, will you please advise if we should make payment as requested in Mr. Jaeger's letter of December 17, 1970, or should we pay Supreme Court costs and Circuit Court costs as directed in the order dated August 3, 1970, and pay the balance plus interest earned into the Babler Memorial State Park Fund, as set out in Sec. 253.360 R. S. 1969."

Mr. Jaeger, Director of Parks for the Missouri State Park Board, has written three letters to you concerning payment of the court costs in the Babler Trust litigation which was terminated

Honorable William E. Robinson

by the Missouri Supreme Court's decision in Mercantile Trust Co., et al v. Jaeger, et al, 457 S.W.2d 727 (Mo. 1970). In summary, Mr. Jaeger's three letters request that you disperse in a particular manner the \$50,000 fund (plus accrued interest) being held by you to cover court costs and expenses of this litigation. Specifically, in Mr. Jaeger's latest letter dated March 1, 1971, he requested that a check in the amount of \$143.35 be made payable to the Clerk of the Circuit Court of the City of St. Louis and that the balance of the court costs and expense fund being held by you be paid to the Dr. Edmund A. Babler Memorial State Park Fund.

We interpret your question to be whether you should comply with the request made by Mr. Jaeger.

On July 7, 1966, two lawsuits were filed -- one by the trustees under a testamentary trust established by the will of Jacob L. Babler, and the other by the Attorney General. Both lawsuits sought adjudication of a dispute which had arisen between the co-trustees of the trust estate and the Attorney General with respect to the amount of compensation due the trustees on termination of the trust. After the suits were filed a stipulation was entered into between the parties providing, in part, that a portion of the corpus of the trust would be set aside by the State Treasurer as a reserve against attorneys' fees, expenses and court costs which might be allowed against the trust as a result of this litigation. The stipulation provided as follows with regard to this reserve:

"1. (B) From the corpus of the trust estate conveyed by the Trustees hereunder to the Treasurer of the State of Missouri, the Treasurer of the State of Missouri shall set aside, and hold apart as a separate fund, pending a final judgment in this case, the sum of \$50,000 as a reserve against attorney fees and expenses of the Trustees and costs of Court, if any, which may be allowed against the trust; it being understood that the Circuit Court and any Appellate Court to which this cause may be appealed retains jurisdiction over said segregated fund of \$50,000 and of the disposition of same; and if the Trustees' attorney fees and expenses and Court costs are ordered paid from the trust estate, the Treasurer of the State of Missouri shall apply said fund of \$50,000 towards payment of such obligations as the Circuit Court and any Appellate Court to which this cause may be appealed in its order shall direct."

Honorable William E. Robinson

In the Missouri Supreme Court's decision in the Mercantile Trust Company case, the following appears with regard to the payment of court costs:

" . . . The court costs in both the trial court and this court are assessed against appellants and ordered paid out of the fund held by the State Treasurer for that purpose." 457 S.W.2d at 735-736.

Therefore, based on the terms of the Stipulation Agreement and on the order of the Missouri Supreme Court terminating this litigation, we conclude that court costs in the Circuit Court for the City of St. Louis and court costs in the Missouri Supreme Court should be paid out of the fund being held by you for that purpose. In this regard, we suggest that you ascertain from the parties to the Babler Trust litigation what court costs have been incurred and, upon receipt of proper verification of these costs from the clerk of the court in question, payment should be made directly to these courts.

With reference to the balance of the reserve fund which you are holding, we note that the Stipulation Agreement provides that this fund shall come from the corpus of the trust estate. Under the Stipulation Agreement the entire corpus of the trust estate with the exception of an amount held by the trustees as compensation claimed by them for their services as trustees, was paid to you as Treasurer of the State of Missouri. We believe that such a disposition of the corpus was consistent with Section 253.360, RSMo 1969, and that the balance of the reserve for court costs, attorneys' fees and expenses which you are holding should be similarly handled. Subsections 1 and 2 of Section 253.360, RSMo 1969, provide as follows:

"1. There is hereby created the 'Doctor Edmund A. Babler Memorial State Park Fund'. All money, funds, and securities acquired as provided in section 253.350 shall be deposited with the state treasurer to the credit of the fund. All income, interest, rights or rent earned through the operation of the fund shall also be credited to the fund.

"2. The state treasurer shall be the custodian of all money, bonds, securities or interests and rights therein deposited in the state treasury to the credit of the Doctor Edmund A. Babler memorial state

Honorable William E. Robinson

park fund and he and his sureties are responsible on his official bond for the faithful performance of his duties in the safekeeping of all money or property of the fund as provided in this section and section 253.350 and for the disbursement of such money or property upon warrants drawn by the Missouri state park board."

Under these provisions, we believe that the State Treasurer is designated as the custodian of all moneys, bonds, securities, interests and rights deposited in the State Treasury to the credit of the Dr. Edmund A. Babler Memorial State Park Fund. Therefore, we conclude that the balance of the reserve fund should be paid to the Dr. Edmund A. Babler Memorial State Park Fund and held by you as custodian.

We are aware of the fact that on the twenty-third day of November, 1966, an agreement was entered into entitled, "Investment Advisory and Custodial Agreement" between the Missouri State Park Board, M. E. Morris, Treasurer of the State of Missouri, and the St. Louis Union Trust Company. Under this agreement, the St. Louis Union Trust Company agreed to act as custodian for the State Treasurer of the assets of the Dr. Edmund A. Babler Memorial State Park Fund. Certain provisions of this agreement setting forth the Trust Company's responsibilities are as follows:

"Trust Company shall have full power and authority to hold all money and securities deposited by said Depositor with said Trust Company and, upon order of Principal, to sell, exchange, assign, transfer, or otherwise dispose of all or any of such securities, or any reinvestments thereof, for such consideration, at such times and upon such terms and conditions as Principal shall deem for the best interest of the Fund; to invest all or any part of the stocks, bonds or other securities deposited with the Trust Company, or proceeds arising from the sale of any of said securities, in such bonds, notes, stocks, both common and preferred, and other securities, domestic or foreign, as Principal may consider safe and desirable; and to make changes of investments and reinvestments thereof whenever deemed advisable by Principal.

"Principal, from time to time, may direct

the sale, exchange, assignment, transfer or other disposition of any stocks, bonds or other securities then in the account of said Fund held by Trust Company in the name of Depositor, by an appropriate directive duly made in writing from Principal to Depositor. A copy of such directive together with appropriate transfer documents shall be forwarded to Trust Company by Principal. Receipt of a copy of such directive together with appropriate transfer documents by Trust Company shall constitute an order from Depositor to Trust Company to execute the terms of said directive."

It is our conclusion that under Section 253.360, RSMo 1969, the State Treasurer "shall be the custodian of all money, bonds, securities or interests and rights therein deposited in the State Treasury to the credit of the Dr. Edmund A. Babler memorial state park fund. . . ." Furthermore, the State Treasurer and his sureties are responsible "for the faithful performance of his duties in the safe keeping of all money or property of the fund as provided in this section and in Section 253.350. . . ." Under the Investment Advisory and Custodial Agreement of November 23, 1966, the State Treasurer has delegated to the St. Louis Union Trust Company performance of his duties as custodian of this fund. We do not believe that such a delegation is authorized by the statute.

Under Section 253.360, the State Park Board is authorized to retain the services of a professional investment counselor or trust company "to advise it in the selection of such investments":

"So far as practicable, the money, bonds, and other securities of the fund shall be kept safely invested so as to earn a reasonable return. The Missouri state park board shall select such investments as are permitted by the laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri, and the state treasurer shall make such investments or reinvestments as directed by the board. The board may retain the services of and pay a reasonable fee to a professional investment counselor or a trust company to advise it in the selection of such investments."

Honorable William E. Robinson

There is no authority in this section to retain the services of or to designate a trust company to perform the custodial functions given to the State Treasurer by the express wording of this statute.

Furthermore, subsection 4 of Section 253.360 provides that "the state treasurer shall make such investments or reinvestments as directed by the board." Under the above quoted portion of the Investment Advisory and Custodial Agreement, the trust company makes the investments or reinvestments as directed by the board. Again, we find no authority in this statute to support a delegation to the trust company of the State Treasurer's responsibility to make investments or reinvestments of this fund.

Subsection 4 of Section 253.360 provides in part as follows:

" . . . The Missouri state park board shall select such investments as are permitted by the laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri, and the state treasurer shall make such investments or reinvestments as directed by the board. . . ."

Permitted investments for the reserve and surplus of a life insurance company include stocks and bonds of private corporations. See Sections 376.300 and 376.305, RSMo 1969.

Under Article IV, Section 15, Constitution of Missouri, 1945, the investment powers of the State Treasurer as custodian of all state funds are set out:

"State treasurer--duties--custody, investment and deposit of state funds--duties limited. The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to

which they belong and disburse them as provided by law. The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. Banking institutions in which state funds are deposited shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits and interest thereon pursuant to deposit agreements made with the state treasurer pursuant to law. No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds."

The Missouri Supreme Court defined "state money" as follows in State ex rel. Thompson v. Board of Regents of Northeast Missouri State College, 305 Mo. 57, 264 S.W. 698 (banc, 1924):

"...[S]tate money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. . . ."

* * *

"...[N]o statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such pay-

Honorable William E. Robinson

ment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. . . ." Id at 700 - 701.

Sections 253.350 and 253.360 authorize the receipt of property given to the state for the benefit of the Dr. Edmund A. Babler Memorial State Park. Therefore, we conclude that any property given to the state pursuant to these sections constitutes "state funds" as the term is used in Article IV, Section 15.

Having so concluded, the investment of these state funds must be in accordance with the direction of Section 15. Any legislative direction in Section 253.360 which conflicts with Section 15 would be invalid.

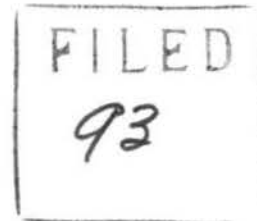
Based on the foregoing, the balance of the reserve against attorneys' fees and expenses of the trustees and costs of court should be deposited by you in the Dr. Edmund A. Babler Memorial State Park Fund and held by you as custodian.

Very truly yours,

JOHN C. DANFORTH
Attorney General

January 12, 1971

Answered by Letter - Klaffenbach
OPINION LETTER NO. 93



Honorable E. J. Cantrell
State Representative
Thirty-third District
306 Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Cantrell:

This letter is in answer to your opinion request in which you inquire as follows:

"Does a member of the State Patrol or any Police Officer in the state of Missouri have authority to order a doctor, nurse, or technician who might be employed in an emergency room to which is brought a driver of a motor vehicle who is suspected of being intoxicated, to draw a blood sample from such person for the purpose of making a determination of the alcohol content in the blood."

We have examined the Missouri statutes and find no provision authorizing the Highway Patrol or any police officer to order physicians or other medical personnel to draw blood samples. We are therefore of the view that they have no such authority.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

January 18, 1971

OPINION LETTER NO. 94

Mr. J. E. Riney, Chairman
State Tax Commission
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Riney:

This is in response to your request for an opinion concerning the effect of Senate Bill No. 3, as passed by the Fourth Extra Session, 75th General Assembly, upon the annual corporation franchise tax for the year 1971.

Senate Bill No. 3, which becomes effective on March 31, 1971, provides as follows:

"Section 147.010, RSMo 1969 is repealed and one new section enacted in lieu thereof, to be known as section 147.010, to read as follows:

"1. For the taxable year of 1971 and thereafter every corporation of this state organized under or subject to chapter 351, RSMo, or under any other laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one percent of the par value of its outstanding shares and surplus, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purpose herein contained such shares shall be considered as having a value of five dollars per share unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value

Mr. J. E. Riney

and the surplus. If such corporation employs a part of its outstanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one percent of its outstanding shares and surplus employed in this state, and for the purposes of this chapter such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.

"2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo, or not, shall pay an annual franchise tax to the state of Missouri equal to that levied in subsection 1 of this section on the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of five dollars per share, unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this chapter such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.

"3. This law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their premium receipts in this state; but bank deposits shall be considered as funds of the individual depositor left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this chapter.

Mr. J. E. Riney

"4. Every corporation filing a report under the provisions of this section shall pay either the tax due or the sum of twenty-five dollars, whichever is greater."

Section 147.020, RSMo 1969, provides that every corporation liable for this tax shall make a report in writing to the State Tax Commission annually on or before the 15th day of April setting forth certain enumerated information concerning the structure and financial condition of the corporation. This report is to be submitted to the State Tax Commission along with a payment for the annual franchise tax as calculated by using the formula contained in Section 147.010. See Section 147.030, sub. 2, RSMo 1969. Section 147.030, sub. 1, RSMo 1969, provides that the State Tax Commission shall, on or before the 15th day of May in each year, make a final determination as to the amount of tax due from each corporation for that year's franchise tax and report this amount to the Director of Revenue, who then makes out a tax bill against each corporation and notifies the proper officials of each corporation of the amount of tax determined by the Commission, the amount paid with the report, and the amount, if any, remaining unpaid. Section 147.030, sub. 2, RSMo 1969, provides that "... When the tax as determined by the commission is paid, the director of revenue shall deliver a receipt for taxes paid which shall recite that the corporation named therein has paid its annual franchise tax for the year ending the thirty-first day of December."

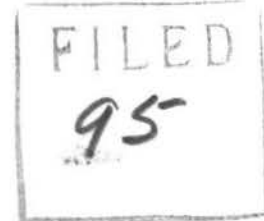
Senate Bill No. 3 changes Section 147.010 in two particulars. It provides for a minimum annual franchise tax of twenty-five dollars, and it provides that this new minimum fee shall be in effect for the taxable year of 1971 and thereafter.

Yours very truly,

JOHN C. DANFORTH
Attorney General

April 6, 1971

OPINION LETTER NO. 95
(Answered by letter - Nowotny)



Honorable D. R. Osbourn
Representative, 99th District
P. O. Box 224
Monroe City, Missouri 63456

Dear Representative Osbourn:

This is in reply to your request for an official opinion of this office concerning the question whether the property of the "Paris Senior Citizens Housing" is exempt from ad valorem taxation under Section 137.100, RSMo, during those years that rent charged does not exceed the operation expenses and interest, and there are no payments on the loan to the Farmers Home Administration.

Without further specific information to the contrary, we understand the facts in this opinion to be like those considered by the Supreme Court of Missouri in two recent cases, with the exception of the deferring of payment on the F.H.A. loan for several years. See *Defenders' Townhouse, Inc., v. Kansas City*, 441 S.W.2d 365 (Mo.1969), and *Paraclete Manor of Kansas City v. State Tax Commission*, 447 S.W.2d 311 (Mo.1969).

Based on the cited cases, it is our opinion that the facility in question does not qualify for a charitable exemption from ad valorem taxation under Section 137.100, RSMo. This is so, whether or not in any given year payments on the loan to the F.H.A. are deferred.

Very truly yours,

JOHN C. DANFORTH
Attorney General

BALLOTS:
ELECTIONS:
CANDIDATES:

Candidates who file as "independent" candidates in the primary election appear under the designation "non-partisan" on the primary election

ballot; and if they are successful in being nominated at the primary election, they appear under the designation "nonpartisan" on the general election ballot. Candidates who are nominated by petition appear under the designation of the party name shown on the petition. A candidate nominated by petition as an "independent" candidate would appear under the "independent" designation.

OPINION NO. 96

March 30, 1971

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your opinion request on the following questions:

"We will appreciate your advice as to whether any candidate who files by declaration is to have his name appear on the Primary ballot under such nonpartisan ticket even though his declaration designated his ticket as 'independent.'

"Further, is the nominee on the nonpartisan ticket as a result of the Primary election carried on the General election ballot under the nonpartisan ticket even though his declaration designated his ticket as 'independent?'

"Finally, we anticipate that in the near future, nominating petitions for a candidate for state-wide office will be filed with this office. Since candidates nominated in this manner do not appear on the Primary Election ballot, are they carried on the General election ballot under the 'independent' or 'nonpartisan' ticket?"

In answer to your first question, we previously held in an opinion to you, Opinion No. 342, 1970, ". . . where it is necessary

Honorable James C. Kirkpatrick

to prepare an 'independent' or 'nonpartisan' ballot, . . . only one ballot is to be prepared and . . . such ballot is a 'nonpartisan' ballot under the provisions of Section 120.450 [RSMo 1969]." A candidate who files declaration designating his ticket as "independent" is to appear under the designation "nonpartisan" on the primary ballot.

In answer to your second question, we are of the opinion that a candidate who is the nominee on the nonpartisan ticket, as a result of the primary election, should be listed on the general election ballot as a "nonpartisan" candidate. Such a designation would be in keeping with the provision of Section 111.341.4, RSMo 1969, which provides that the names of nominees of each political party shall be placed under the party name designated by it in the certificates of nominations. While strictly speaking, a nonpartisan candidate, is not a candidate of a party, the candidate has been nominated as a nonpartisan candidate and a reasonable reading of Section 111.341.4 would indicate that he is to retain that same "party" label in the general election.

In answer to your third question, when a candidate is nominated by petition in accordance with the provisions of Section 120.190, RSMo 1969, his name should appear on the ballot under the party name designated in the nominating petitions, as is required by Section 111.341.4, RSMo 1969, wherein it provides "Names of the nominees of each . . . group of petitioners shall be placed under the party name designated by . . . petitions" Therefore, if petitions to nominate a candidate were filed with the name of the party therein shown as "independent," the candidate's name would appear under the designation "independent" on the general election ballot.

CONCLUSION

It is the opinion of this office that candidates who file as "independent" candidates in the primary election appear under the designation "nonpartisan" on the primary election ballot; and if they are successful in being nominated at the primary election, they appear under the designation "nonpartisan" on the general election ballot. Candidates who are nominated by petition appear under the designation of the party name shown on the petition. A candidate nominated by petition as an "independent" candidate would appear under the "independent" designation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

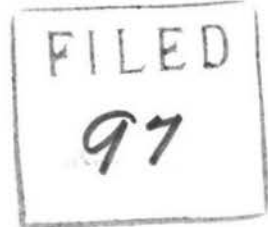
Enclosure: Op. No. 342
5-22-70, Kirkpatrick

SCHOOLS:
BONDS:

1. A school board may allocate to debt service for payment of bonds issued by the district part of the \$1.25 which it can levy without voter approval pursuant to Section 11(b) of Article X, Missouri Constitution; 2. Should a future school board determine that the entire \$1.25 must be allocated to the current operational expenses of the district, this school board must, pursuant to Section 164.161, RSMo 1969, provide for the collection of an annual tax sufficient to pay the interest and principal on the bonds and to retire them within twenty years.

March 15, 1971

OPINION NO. 97



Honorable Edward Stone, Jr.
State Senator
Twenty-sixth District
State Capitol
Jefferson City, Missouri 65101

Dear Senator Stone:

This is in response to your request for an opinion of this office with respect to the following question:

"The Wentzville R-4 School Board is considering a major bond issue for voter approval during 1971. It is hoped that it can manage the new debt without any increase in the total school tax rate of \$5.43.

"The proposed new debt can be retired by a \$.16 rate. The School Board now levies \$.21 for current building maintenance and \$1.04 for the incidental fund to account for the \$1.25 that the school board may levy without a vote.

"Now I have suggested that \$.16 of the \$.21 building rate be used for debt service. This would leave the total rate set by the board at only \$1.09 instead of the \$1.25.

"The question is whether this Board or some future Board could legally restore the full \$1.25 that it is authorized to levy without a vote of the people."

We interpret the foregoing to pose two questions:

1. May the school board allocate \$.16 of the \$1.25 which it can levy without voter approval to debt service?

Honorable Edward Stone, Jr.

2. If the answer to No. 1 is in the affirmative, could a future school board allocate the entire \$1.25 which it can levy without voter approval to current operations of the school district and increase the debt service levy by 16 cents thereby increasing the total tax rate of the district by 16 cents?

In answer to question No. 1, Section 11(b) of Article X, Missouri Constitution, 1945, provides that for school districts formed of cities and towns a maximum rate of \$1.25 may be levied without voter approval.

"Limitations on local tax rates. Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * *

"For school districts formed of cities and towns, including the school district of the city of St. Louis -- one dollar and twenty-five cents on the hundred dollars assessed valuation; . . ."

So long as the funds received from the levy provided in Section 11(b) are spent for a legitimate school purpose, the Constitution does not restrict the purposes for which the money may be spent.

Similarly, the statutory provisions applicable to this subject do not determine the manner in which funds received from the levy the board can assess without voter approval shall be allocated. Section 164.011, RSMo 1969, requires that the school board submit each year prior to July 15, an estimate specifying the amount of money needed to be raised by taxation, the rate required to produce such an amount and the funds for which the money is to be used.

"Annual estimate of money required by district and tax rate -- date for filing . . . The school board of each district annually shall prepare an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce the amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the ensuing school year, to meet principal and interest payments on the bonded debt of the district, and to provide the funds which have been ordered by the voters of the dis-

Honorable Edward Stone, Jr.

trict for other legitimate district purposes. The school board of each district under the supervision of the county superintendent shall forward the estimate to the county superintendent on or before the fifteenth day of May. The school board in all other districts shall forward the estimate to the county clerk on or before the fifteenth day of July. In school districts divided by county lines the estimate shall be forwarded to the proper officer of each county in which any part of the district lies."

The first subsection of Section 165.011 sets up certain funds into which tax money shall be placed as it is received:

"District funds -- allocation of moneys -- transfers -- tuition paid from what funds. --
1. The following funds are created for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, and debt service fund. The treasurer of the county, township or school district shall open an account for each fund specified in this section, and all moneys received from the county school fund, all moneys derived from taxation for teachers' wages, all tuition fees, and not less than eighty percent of the state moneys received under subsections 1, 2 and 3 of section 163.031, RSMo, and all other moneys received from the state except as herein provided, shall be placed to the credit of the teachers' fund. The remainder of the state moneys received under subsections 1, 2 and 3 of section 163.031, RSMo, money apportioned by the state and received from other districts for transportation, and money derived from taxation for incidental expenses shall be credited to the incidental fund. Money apportioned for free textbooks shall be credited to the free textbook fund. All money derived from taxation or received from the state for the erection of buildings or additions thereto and the remodeling or reconstruction of buildings and the furnishing thereof, for the purchase of real estate, or from sale of real estate, schoolhouses or other buildings of any kind, or school furniture, from insurance, from sale of bonds other than refunding bonds, shall be placed to the credit

Honorable Edward Stone, Jr.

of the building fund. Money derived from taxation for the retirement of bonds and the payment of interest thereon shall be credited to the debt service fund. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed to the credit of the fund from which the original expenditures were made. Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board."

Furthermore, if a school district desires to raise its levy above the rate which can be assessed without voter approval, Sections 164.021 and 164.031 require that the purpose or purposes for the increase must be set forth in the proposal and in the ballots submitted to the electorate.

None of these statutory provisions restrict the power of the school board to allocate to any legitimate school purpose the \$1.25 which it can levy without voter approval. See Attorney General's Opinion No. 64, dated November 6, 1953, to Honorable J. P. Morgan (a copy of which is enclosed herewith).

Should the voters of the Wentzville School District approve the bond issue, the school board would be obligated under Section 164.161 to provide for the collection of an annual tax sufficient to pay the interest and principal of the bonds as they fall due and to retire them within twenty years from the date contracted.

"Restrictions on loans -- bonds of urban districts to be disposed of at ninety-five percent of par value. -- 1. The loans authorized by sections 164.121 to 164.141 shall not be contracted for a longer period than twenty years, and the entire amount of the loans shall at no time exceed, including the present indebtedness of the district, in the aggregate ten percent of the value of taxable tangible property therein as shown by

Honorable Edward Stone, Jr.

the last completed assessment for state and county purposes. The rate of interest upon the bonds shall, in no case, exceed the highest legal rate allowed by contract. Before or at the time of issuing the bonds, the board of directors shall provide for the collection of an annual tax sufficient to pay the interest and principal of the bonds as they fall due, and to retire them within twenty years from date contracted."

If the bonds are approved by the voters and issued, there is no requirement that the amount of the levy sufficient to retire the bonds within twenty years need be submitted to the voters. Section 164.161 and Benton v. Scott, 168 Mo. 378, 68 S.W. 78 (1902).

Therefore, in response to question No. 1, we conclude that if the bonds are approved by the voters and issued, it is the responsibility of the school board to provide for a levy sufficient to retire the bonds within twenty years and that the school board has the discretion to allocate for that purpose part of the \$1.25 which it can levy without voter approval pursuant to Section 11(b) of Article X.

Should the current school board decide to allocate part of the \$1.25 to debt service, thereby not increasing this year's total tax rate for the school district, could a future school board decide on a different allocation of the \$1.25 which would result in an increase in the total tax rate by an amount sufficient to retire the bonds in twenty years? As we have indicated in response to question No. 1, a school board has the discretion to allocate the \$1.25 as it believes advisable. Should a future school board determine that the entire \$1.25 must be allocated to current operational expenses of the school district, thereby deleting the debt service portion of the \$1.25 which the current board had allocated, the future school board would be required to provide for an annual tax sufficient to pay the interest and principal on the bonds. See Section 164.161. Whatever amount is necessary could be levied by that board without voter approval. Section 11(e), Article X, Missouri Constitution; Section 164.161 and Benton v. Scott, supra.

CONCLUSION

Therefore, it is the conclusion of this office that:

1. A school board may allocate to debt service for payment of bonds issued by the district part of the \$1.25 which it can levy without voter approval pursuant to Section 11(b) of Article X, Missouri Constitution;

2. Should a future school board determine that the entire \$1.25

Honorable Edward Stone, Jr.

must be allocated to the current operational expenses of the district, this school board must, pursuant to Section 164.161, RSMo 1969, provide for the collection of an annual tax sufficient to pay the interest and principal on the bonds and to retire them within twenty years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion No. 64, November 6, 1953
Honorable J. P. Morgan

March 23, 1971

Answer by letter-Mansur

OPINION LETTER NO. 98

Honorable W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County Court House
Charleston, Missouri 63834



Dear Mr. Banta:

This is in response to your request for an opinion from this office on whether a county clerk in a third class county may accept employment and receive additional compensation for serving as an assistant ditch supervisor to aid and assist the supervision of work on ditches in a drainage district organized by the county court under Chapter 243, RSMo.

We are enclosing herewith Opinion No. 152 issued by this office on November 4, 1965, to Honorable Haskell Holman, State Auditor, Jefferson City, Missouri. It generally defines the principles of law that apply to public officials accepting other or additional employment while holding public office. These same principles would apply to a county clerk in a third class county in accepting employment as described by you.

The duties of public officers are those defined by statute and those necessarily implied in order to perform those described by statute. We do not find any statute that makes it the duty of the county clerk in a third class county to supervise the construction of drainage ditches in a drainage district organized by the county court. Such work does not appear to be in conflict with or incompatible with any of the official duties of a county clerk in a third class county.

Honorable W. Clifton Banta, Jr.

It is our opinion that a county clerk in a third class county may accept employment and receive additional compensation for acting as an assistant ditch supervisor to aid and assist in the supervision of the construction of drainage ditches in a drainage district organized by the county court if he is otherwise qualified for such employment.

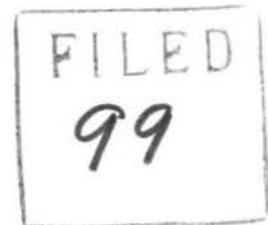
Yours very truly,

JOHN C. DANFORTH

Enclosure: Op. No. 152
11-4-65, Holman

February 3, 1971

Answered by Letter - Klaffenbach
OPINION LETTER NO. 99



Honorable Ray S. James
State Representative
Fifth District
Room 202A, Capitol Building
Jefferson City, Missouri 65101

Dear Representative James:

This letter is in response to your opinion request in which you ask whether the State Committee of a political party in Missouri has the authority to determine the qualifications of its members.

Section 120.820, RSMo 1969, provides:

"The members of each congressional district committee as so chosen shall meet at some point within the district, to be designated by the then chairman of the congressional committee, on the last Tuesday in August after the primary election and organize by the election of one of their number as chairman and one as vice chairman, one of whom shall be a woman, and by the election of a secretary, and treasurer, one of whom shall be a woman, but who may or may not be members of the committee, and having so organized such committee shall proceed to elect three men and three women, qualified electors of the district, as members of the party state committee."

Honorable Ray S. James

Section 120.830, RSMo 1969, provides:

"The members of the state committee elected as in sections 120.770 to 120.840 provided shall meet at noon on the second Tuesday in September next following the August primary, at some point in the City of Jefferson to be designated by the then existing state committee, and organize by the election of one of their number as chairman and one as vice chairman, one of whom shall be a woman, and by the election of a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the state committee. Having so organized, the state committee shall meet with the party nominees for state offices, candidates for judges of the circuit courts, for the Congress of the United States and for the general assembly of Missouri and shall formulate and make public a state platform for their party."

We find no Missouri statute authorizing the State Committee to determine the qualifications and election of its members. Further, it appears that there have been but few cases in the United States on the subject and little authority recognizing an inherent common law power in a body to pass upon the qualifications and election of its own members. 16 Am. & Eng. Ann. Cas. 162. While it appears that the English courts have been inclined to hold that their municipal and legislative bodies have such inherent common law power, we are not able, in view of the lack of authority supporting the proposition in the United States, to conclude that our Missouri courts would hold that a body such as the State Committee has such inherent power.

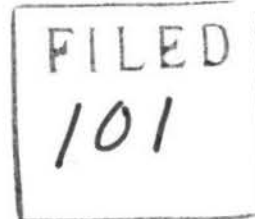
Inasmuch as Section 120.820 provides that the members of the party State Committee shall be elected by the members of the congressional district committees and since there is no statutory provision authorizing the State Committee to determine the qualifications and election of such members, we are of the view that the State Committee does not have such authority.

Very truly yours,

JOHN C. DANFORTH
Attorney General

OPINION LETTER NO. 101
Answer by Letter (Danforth)

Honorable E. J. Cantrell
Missouri House of Representatives
306 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Cantrell:

This is in reply to your request for an opinion of this office on the question whether a fourth class city may by ordinance require city license stickers on motor vehicles located on private property. For the reasons stated below, the answer to this question depends on whether the motor vehicles are ever used on the streets of the city enacting the ordinance.

Section 301.340 RSMo 1969 which authorizes municipalities to levy and collect license taxes provides in part:

"Municipalities, by ordinance, may levy and collect license taxes from the owners of and dealers in motor vehicles, residing in such municipalities, and may require the display of license plates or stickers. ...

"No municipal license tax shall be collected from a resident of any municipality for motor vehicles used exclusively outside of such municipality, and that fact may be shown by an affidavit of the motor vehicle owner for the purpose of securing a state registration certificate without producing a receipt for municipal license taxes. ..."

Section 301.340 contains a table limiting the amount of city license taxes to designated maximum amounts based upon the horsepower or manufacturer's rated capacity of the vehicle.

Honorable E. J. Cantrell

On its face, Section 301.340 authorizes municipalities to collect license taxes from resident owners of motor vehicles unless the motor vehicles are "used exclusively outside of such municipality." The question posed in your request does not encompass a vehicle used exclusively outside the municipal boundaries, but a vehicle which is never used on any street or highway, within or without the taxing municipality.

We believe that, in light of the statutory fee scale based on horsepower and manufacturer's rated capacity, Section 301.340 would be viewed by a court as a fee for the privilege of operating motor vehicles, and that it would not be applied if it could be shown that a vehicle is always kept on private property and never operated on a municipality's streets. This view that a city license fee need not be paid unless a vehicle is actually used on city streets is supported by *City of Frankford v. Davis*, 348 SW2d 553 (St.L.Ct.App. 1961) 1.c. 557 where it was said:

"...The only license tax permissible under the enabling act, therefore, the only one permissible under the ordinance, is one against the owner of a motor vehicle who must be a resident of the municipality and who uses or operates said motor vehicle within the municipality. ..."

In an analogous case, the Supreme Court of Missouri has held that a state motor vehicle registration fee is a license fee for the privilege of operating the vehicle on the highways of the state and not a tax on property where the fee is graduated according to the destructiveness of the vehicle to the highway. *State ex rel. McClung v. Becker*, 288 Mo. 607, 233 SW 54 (Banc 1921). It follows that such a license fee for the privilege of operating a motor vehicle on city streets need not be paid when the vehicle is never so operated.

We point out, also, that state license plates are not required on vehicles operated exclusively on the property of the owner. *State v. Hall*, 351 SW2d 460 (K.C.Ct.App. 1961).

Although a municipality may not require a city license sticker on a motor vehicle which is never removed from private property, such a sticker may be required on a vehicle despite the fact that operation on city streets is only occasional.

Honorable E. J. Cantrell

In *City of Nevada v. Bastow*, 328 SW2d 45 (K.C.Ct.App. 1959) it was held that a truck was required to comply with a city's licensing ordinance even though the primary use of the truck was on trips between Iowa and Arkansas, and the streets of the city were used only for the purpose of getting to and from a parking area.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
INTEREST:

1. A six-director school district which has exhausted its working capital or anticipates such ex-

haustion in the near future has the power without obtaining voter approval to borrow money to meet its current operating expenses, provided its unencumbered anticipated revenue for the calendar year is sufficient, at the time the loan is made, to repay the principal and interest on the indebtedness. 2. The highest rate of interest at which a six-director school district may contract to borrow money is eight percent per annum. There are no restrictions as to maturity date or form of obligation. However, Section 432.070, RSMo 1969, which governs a school district's contracts in general, is applicable to a six-director school district's contract to borrow money.

OPINION NO. 103

July 19, 1971

Honorable Donald L. Manford
State Senator
Eighth District
9409 Oakland
Kansas City, Missouri 64138

FILED

103

Dear Senator Manford:

This is in response to your request for an opinion from this office with respect to the following:

"1. Does a six-director school district which has exhausted its working capital have the power to borrow money to operate its schools, provided the amount borrowed does not exceed its ascertainable anticipated tax and/or state aid entitlement revenue for the calendar year in which the loan is obtained?

"2. Does the six-director school district which anticipates the exhaustion of its working capital in the foreseeable future so that it will soon have insufficient funds to keep its schools open have the

power to borrow money to operate its schools, provided the amount borrowed does not exceed its ascertainable anticipated tax revenue and/or state aid entitlement for the calendar year in which the loan is obtained?

"3. If the six-director school district has power to incur indebtedness under the circumstances as described in question 1 and/or 2 above, are there any appreciative restrictions as to the (a) rate of interest, (b) maturity date and (c) form of obligation which it may validly negotiate and contract to pay with respect to any loans obtained for public school purposes?

"4. Are there any other circumstances in which a six-director school district may borrow money to operate its schools and issue promissory notes (as distinguished from the issuance of bonds as provided in section 164.121, RSMo. 1969) for the payment thereof?"

A school district's authority to incur an indebtedness is governed by subsections (a) and (b) of Section 26, Article VI, Constitution of Missouri, 1945, which provide as follows:

"(a) No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution.

"(b) Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors

Honorable Donald L. Manford

voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

Subsections (a) and (b) of Section 26 permit a school district to anticipate its revenue by incurring an indebtedness in an amount not to exceed its unencumbered revenue for the calendar year in which such debt is contracted or created but prohibit anticipation of revenue beyond that amount or for any future year except by consent of two-thirds of the voters. First Nat. Bank of Stoutland v. Stoutland School Dist., 319 S.W.2d 570 (Mo. 1958); Pullum v. Consolidated School Dist. No. 5, 211 S.W.2d 30 (Mo. 1948); Clarence Special School Dist. v. School Dist. No. 67, 341 Mo. 178, 107 S.W.2d 5 (1937).

In First Nat. Bank of Stoutland v. Stoutland School Dist., supra, the school district was frequently without funds to pay its current operating expenses because its anticipated tax revenue was not collected and distributed to the district. In order to meet the exigencies of the situation the school board authorized its officers to enter into a loan arrangement with the bank. Pursuant to this authorization the school district borrowed money from the bank on several separate occasions. At the time each loan was made, the school district's unencumbered anticipated tax revenue for the calendar year was more than sufficient to repay the principal and interest. Responding to the contention that the school district did not have the authority to borrow money in anticipation of its tax revenue, the Supreme Court of Missouri stated that:

"Admittedly, no constitutional or statutory provision expressly authorizes a school district to borrow money in this or any other manner. Nevertheless, Section 26(a) of Article 6, Const.Mo.1945, is a self-enforcing grant of power to school districts to incur an indebtedness for public school purposes in an amount not 'exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years * * *.' State ex rel. Gilpin v. Smith, 339 Mo. 194, 96 S.W.2d 40; State ex Inf. Dalton v. Metropolitan St. Louis Sewer Dist., 365 Mo. 1, 275 S.W.2d 225; Bull v. McQuie, 342 Mo. 851, 119 S.W.2d 204; State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S.W. 318; Trask v. Livingston County, 210 Mo. 582, 109 S.W.

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656, 37 L.R.A.,N.S., 1045; Book v. Earl, 87 Mo. 246. A constitutional limitation on the extent, amount, or purpose of a school district's borrowing power is not a limitation on its authority to incur any indebtedness whatever (79 C.J.S. Schools and School Districts § 325b (3), p. 15), and, as of course, the payment of its debts and obligations, legally incurred, is a public school purpose. State ex rel. Gilpin v. Smith, supra; State ex rel. Clark County v. Hackmann, supra. . . ." Id. 573.

Thus, in response to your first question, a six-director school district, which has exhausted its working capital, has the power to borrow money to meet current operating expenses provided its unencumbered anticipated revenue for the calendar year is sufficient, at the time the loan is made, to repay the principal and interest on the indebtedness.

In the second question you inquire whether a six-director school district may, in anticipation that its working capital will soon be exhausted, but before its funds are actually exhausted, borrow funds to meet current expenses in accordance with the rules set forth above. Section 26(a) limits only the amount of money a school district may borrow without voter approval. There is no requirement that a school district must have actually exhausted its funds before exercising the power to anticipate its revenue by borrowing money to meet current operating expenses. The policy of Section 26(a) is to abolish the credit system and put counties and other public corporations on a cash basis by limiting the legal expenditures in any given year to the income and revenue of that year unless voter approval is obtained for incurring debt. Mis-souri Toncan Culvert Co. v. Butler County, 352 Mo. 1184, 181 S.W.2d 506 (1944). However, to require that a school district or other municipal corporation actually exhaust its working capital before exercising its power to borrow would be unduly restrictive when it is clear that anticipated revenue will not be received soon enough to pay current expenses. Thus, in answer to your second question, we conclude that a six-director school district which anticipates that it will soon have insufficient funds to meet current operating expenses may borrow money to pay those expenses before it has actually exhausted its working capital provided its unencumbered anticipated revenue for the calendar year is sufficient, at the time the loan is made, to repay the principal and interest on the indebtedness.

Your third question concerns whether a six-director school district's power to borrow money is restricted as to the (a) rate

Honorable Donald L. Manford

of interest, (b) maturity date or (c) legal type or form of obligation. Considering (a), there is a statutory limitation on the rate of interest at which a school district may borrow money under the above circumstances. The limitation is contained in Section 408.030, RSMo 1969, which provides that parties may agree to the payment of interest on money due or to become due upon any contract in an amount not exceeding eight percent per annum.

Section 408.060, RSMo 1969, however, excepts corporations from the limitations imposed by Section 408.030, RSMo 1969. Section 408.060 provides in part:

" . . . no corporation shall, . . . interpose the defense of usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor be set aside, impaired or adjudged invalid by reason of the rate of interest which the corporation may have paid or agreed to pay hereon."

A school district is an agency, subdivision or instrumentality of the state formed for the single purpose of promoting education and has been classified as a public or municipal corporation. Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947); State ex rel. Brickey v. Nolte, 350 Mo. 842, 169 S.W.2d 50 (1943); Russell v. Frank, 348 Mo. 533, 154 S.W.2d 63 (1941); School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 S.W.2d 909 (1937); 78 C.J.S. Schools and School Districts, Sections 24-25. It might be argued, therefore, that Section 408.060 permits a school district to contract to borrow money at any rate of interest.

However, the law is well established in Missouri that the state and its subordinate subdivisions and agencies are not to be considered as within the purview of a statute, however general and comprehensive the language may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This doctrine applies with special force to statutes by which rights or interests of the state would be diminished or liabilities imposed upon it. Paulus v. City of St. Louis, 446 S.W.2d 144, (Mo. St.L.App. 1969); Farris v. Hendrichs, 410 S.W.2d 97 (Mo. St.L.App. 1966); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); Hayes v. City of Kansas City, 241 S.W.2d 888 (Mo. 1951). Furthermore, the word "corporation" as used in statutes is considered to refer to private corporations, not municipal corporations. 82 C.J.S., Statutes, Section 317. Thus, we conclude that eight percent per annum is the highest rate of interest

Honorable Donald L. Manford

at which a school district may contract to borrow money under the circumstances presented in this opinion request.

The answers to items (b) and (c) are set forth in First Nat. Bank of Stoutland v. Stoutland School Dist. supra, wherein the court stated that:

" . . . There is some discretion in the school board, the power to borrow money or to contract a debt carries with it the authority to agree with its creditor, within constitutional or statutory limitations and within its unencumbered revenue, as to the time and method of payment. Judd v. Consolidated School Dist. No. 3 of Platt County, 227 Mo.App. 921, 58 S.W.2d 783; Arkansas-Missouri Power Corp. v. City of Kennett, 348 Mo. 1108, 156 S.W.2d 913; 15 McQuillin, Municipal Corporations, Sec. 39.09, p. 20. . . ." Id. at 573.

As discussed above, the only constitutional limitation upon a school district's power to borrow money or to contract a debt is the restriction in Section 26(a) upon the amount of indebtedness that a school district may incur in any given calendar year without voter approval. The only statutory limitation is that imposed by Section 432.070, RSMo 1969, which provides as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

This statutory limitation upon a school district's power to contract a debt is mandatory, not merely directory. First Nat. Bank of Stoutland v. Stoutland School Dist. supra; Hoeverman v. Reorganized School Dist. R-2 of Crawford Co., 452 S.W.2d 298 (Mo. Spg.App. 1970).

Honorable Donald L. Manford

Because your fourth question does not relate to any particular factual situation, we are asked to hypothesize all other situations wherein a school district may validly exercise its power to incur an indebtedness without voter approval. We do not believe it appropriate for us to so speculate on what may occur in the future. Thus we decline to answer this question and reserve our opinion for an appropriate occasion in the future when a specific factual situation is presented.

CONCLUSION

It is therefore the opinion of this office that:

1. A six-director school district which has exhausted its working capital or anticipates such exhaustion in the near future has the power, without obtaining voter approval, to borrow money to meet its current operating expenses, provided its unencumbered anticipated revenue for the calendar year is sufficient, at the time the loan is made, to repay the principal and interest on the indebtedness.

2. The highest rate of interest at which a six-director school district may contract to borrow money under the above circumstances is eight percent per annum. There are no restrictions as to maturity date or form of obligation. However, Section 432.070, RSMo 1969, which governs a school district's contracts in general, is applicable to a six-director school district's contract to borrow money.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, D. Brook Bartlett and John B. Mitchell.

Very truly yours,



JOHN C. DANFORTH
Attorney General

DENTISTS:
SURGERY:

A dentist may legally perform
biopsies and diagnose malignant
growths of surfaces inside the
oral cavity

OPINION NO. 104

January 22, 1971

Reuben R. Rhoades, D.D.S.
Secretary
Missouri Dental Board
415 Central Trust Building
Jefferson City, Missouri 65101



Dear Dr. Rhoades:

This is in response to your letter requesting an opinion on the legality of "a dentist performing biopsies and diagnosing malignant growths in the mouth and surrounding tissue." From subsequent discussion with you, it is our understanding that your question pertains to biopsies and diagnoses of surfaces inside the oral cavity. It is our further understanding that a biopsy entails the surgical removal of specimen tissues of the body for purposes of examination and diagnosis.

Chapter 332, RSMo 1969, establishes the Missouri Dental Board, and sets forth the statutory requirements under which dentistry may be practiced in this State. Section 332.071 defines the practice of dentistry as follows:

"A person or other entity practices dentistry within the meaning of this chapter who:

"(1) Undertakes to do or perform dental work or dental services or dental operations or oral surgery, by any means or methods, gratuitously or for a salary or fee or other reward, paid directly or indirectly to him or to any other person or entity;

"(2) Diagnoses or professes to diagnose, prescribes for or professes to prescribe for, treats or professes to treat, any disease, pain, deformity, deficiency, injury or physical condition of human teeth or adjacent structures or treats or professes to treat any disease or disorder or lesions of the oral regions;

* * *

Dr. Reuben Rhoades

"(8) Attempts to or does perform or do any preventive, remedial, corrective, or restorative dentistry or dental service or dental operation in the human mouth;"

It is apparent that the legislature has used very broad language in describing those procedures encompassed within the practice of dentistry. A biopsy consists of the surgical removal of tissue, and the legislature has defined the practice of dentistry to include "oral surgery" and the treatment of "any disease or disorder or lesions of the oral regions." With reference to diagnosis, Section 332.071 states that a dentist "[d]iagnoses . . . any disease . . . of human teeth or adjacent structures."

We believe the words "adjacent structures" are broad enough to include all surfaces within the oral cavity. It is a fundamental rule of statutory construction that words used by the legislature should be given their plain and ordinary meaning. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. 1970). This rule is specifically applied to Missouri statutes with the sole exception of "technical words and phrases having a peculiar and appropriate meaning in law." Section 1.090, RSMo 1969.

You have informed us that the phrase "adjacent structures" has no technical dental or medical meaning. Black's Law Dictionary 4th Ed., (1951) defines "adjacent" as follows:

"Lying near or close to; sometimes, contiguous; neighboring. Ex parte Jeffcoat, 108 Fla. 207, 146 So. 827. Adjacent implies that the two objects are not widely separated, though they may not actually touch, Harrison v. Guilford County, 218 N.C. 718, 12 S.E.2d 269, while adjoining imports that they are so joined or united to each other that no third object intervenes. Wolfe v. Hurley, D.C.La., 46 F.2d 515, 521."

The Supreme Court of Missouri has said that objects need not touch each other to be adjacent, but must be close to each other. Hauber v. Gentry, 215 S.W.2d 754 1.c. 758 (Mo. 1948). We believe that surfaces inside the oral cavity are sufficiently close to the teeth, to be adjacent structures within the meaning of Section 332.071(2), and, therefore, properly within the diagnostic function of dentistry

Dr. Reuben Rhoades

CONCLUSION

It is the opinion of this office that a dentist may legally perform biopsies and diagnose malignant growths of surfaces inside the oral cavity.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Answer by letter-Klaffenbach

January 20, 1971

OPINION LETTER NO. 105

Honorable Ray Lee Caskey
Prosecuting Attorney
Second Floor Court House
Alton, Missouri 65606



Dear Mr. Caskey:

This letter is in response to your opinion request which is stated as follows:

"Will you please give me an opinion as to whether or not a man and women [sic] are legally married, notwithstanding Section 451.040 RSMo., where a license was obtained in Arkansas, the ceremony performed in Missouri, and the man and woman believing marriage valid, consummated same and have been living together as husband and wife for twelve years. In rendering this opinion I would like to direct your attention Subsection six (6) of Section 451.040 RSMo."

The subsection you cite states:

"6. Provided, however, that no marriage shall be deemed or adjudged invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person so solemnizing the same under section 451.100, if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage."
(Emphasis added)

In our Opinion No. 82, dated February 28, 1962, to Steck, copy enclosed, we held that marriages solemnized in Missouri on the basis

Honorable Ray Lee Caskey

of licenses issued in other states are invalid. While we did not there consider the above subsection, we believe that the subsection refers only to the want of authority under Section 451.100, RSMo 1969. The latter section refers only to the persons authorized to perform marriages.

Therefore, it is our view that under the circumstances you pose there was no valid marriage and subsection 6 of Section 451.040 does not apply.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 82
2-28-62, Steck

April 15, 1971

Answered by Letter - Mansur
OPINION LETTER NO. 109



Honorable Peter H. Rea
Prosecuting Attorney
Taney County
Taney County Court House
Forsyth, Missouri 65653

Dear Mr. Rea:

This is in response to your request for an opinion from this office as follows:

"Please provide my office with statutory authority and case authority, if such exists, as to my duty as prosecuting attorney in regard to the operation of the Welfare Department in my county. Does the prosecuting attorney have any duty to ascertain or determine, or to investigate or prosecute misrepresentations made in connection with the obtaining of relief, or fraud and misrepresentation in connection with retaining this help from the taxpayer? If the prosecutor has a duty, does the Welfare Department have a duty to provide the prosecutor's office with any and all information relating to the amount of money granted to individuals, the individual's name, and the basis for obtaining this relief?"

We direct your attention to Section 56.060, RSMo, 1969. Under this statute, it is the duty of the prosecuting attorney to commence and prosecute all civil and criminal actions in his county

Honorable Peter H. Rea

in which the county or state is concerned and defend all suits against the state or county.

It is our view that in criminal matters, it is the duty of the prosecuting attorney to be zealous in enforcement of the criminal laws, and in the exercise of his discretion, he has the right to choose the course of action or non action, as long as he does not act willfully or arbitrarily, in determining when, how and against whom to initiate criminal proceedings within his county. State ex rel. Griffin v. Smith, 258 S.W.2d 590.

While it is not the duty of the prosecuting attorney to pry in other people's business, it is his duty to initiate proceedings against parties he knows, or has reason to believe have committed crimes. State ex inf. Dalton v. Moody, 325 S.W.2d 21; State on inf. McKittrick v. Wallach, 182 S.W.2d 313; State on inf. McKittrick v. Wymore, 132 S.W.2d 979.

It is the opinion of this office that if a prosecuting attorney knows or has a good reason to believe that an individual has violated the criminal law in obtaining or in attempting to obtain public assistance from the State Division of Welfare, it is his duty to make such investigation as he deems necessary and file criminal charges in the same manner as he would in any other criminal violation.

When the State Division of Welfare informs the prosecuting attorney of a criminal violation, it is his duty to make such an investigation as he deems necessary to determine whether a crime has been committed and if so, it is his duty to prosecute in the same manner as he would in any other criminal case. Under Section 208.040, RSMo 1969, the Division of Welfare may request the prosecuting attorney to investigate and take any action he deems necessary to secure support for the children in aid to dependent children cases.

It is the opinion of this office that a prosecuting attorney has no authority or duty to make any investigation to determine whether an applicant or recipient is eligible for public assistance unless a crime is involved or under investigation. The determination of eligibility for public assistance is vested in the State Division of Welfare under Chapter 208, RSMo.

Section 208.120, RSMo 1969, provides:

"1. For the protection of applicants and recipients, all officers and employees of the state of Missouri are prohibited, except as hereinafter provided, from disclosing any information obtained by them

in the discharge of their official duties relative to the identity of applicants for or recipients of benefits or the contents of any records, files, papers and communications, except in proceedings or investigations where the eligibility of an applicant to receive benefits, or the amount received or to be received by any recipient, is called into question, or for purposes directly connected with the administration of old age assistance aid to dependent children, and aid to the permanently and totally disabled. In any judicial proceedings, except such proceedings as are directly concerned with the administration of these programs, such information obtained in the discharge of official duties relative to the identity of applicants for or recipients of benefits, and records, files, papers, communications and their contents shall be confidential and not admissible in evidence.

"2. The division of welfare shall in each county welfare office maintain monthly a report showing the name and address of all recipients certified by such county welfare office to receive old age assistance, aid to dependent children and aid to the permanently and totally disabled benefits, together with the amount paid to each recipient during the preceding month, and each such report and the information contained therein shall be open to public inspection at all times during the regular office hours of the county welfare office; provided, however, that all information regarding applicants or recipients other than names, addresses and amounts of grants shall be considered as confidential.

"3. It shall be unlawful for any person, association, firm, corporation or other agency to solicit, disclose, receive, make use of or authorize, knowingly permit, participate in or acquiesce in the use of any name or list of names for commercial or political purposes of any nature; or for any name or list of names of recipients secured from such report in the county welfare office to be published in any manner.

Honorable Peter H. Rea

Anyone willfully or knowingly violating any provisions of this section shall be guilty of a misdemeanor. If the violation is by other than an individual, the penalty may be adjudged against any officer, agent, employee, servant or other person of the association, firm, corporation or other agency who committed or participated in such violation and is found guilty thereof."

Under this statute, all officers or employees of the state of Missouri are prohibited from disclosing any information obtained by them to discharge their official duties except as provided therein. It is the opinion of this office that the officers or employees of the State Division of Welfare are not prohibited under the above statute from disclosing information they have to the prosecuting attorney of the county that involves the commission of a crime by an applicant or recipient of public assistance but only if the investigation is to determine if a criminal offense has been committed but not in any other matter concerning the eligibility of an applicant or recipient for public assistance except as required in aid to dependent children cases under Section 208.040. We believe the same is true if a prosecuting attorney believes or has reason to believe that a particular individual has committed a criminal offense in obtaining public assistance. Employees of the Division of Welfare would not be prohibited from furnishing any information they have that involves a violation of the criminal laws of this state concerning public welfare.

In regard to the duties of the prosecuting attorney in civil matters, under Section 50.060, RSMo 1969, it is the duty of the prosecuting attorney to commence and prosecute all civil cases in which the county or state is concerned, and defend all suits against the state or county. In 27 C.J.S. District and Prosecuting Attorneys, paragraph 12(5) the rule is stated:

"The prosecuting attorney and the county board stand in the same position as that of attorney and client generally. If the administrative body of a county has by law the direction and control of litigation except in specified cases, the prosecuting attorney cannot institute any other proceeding on behalf of the county without authority from such body; but his duty to institute proceedings on behalf of the state is not dependent on authority from any public officer required to report violations of law and direct prosecutions in certain cases. It has been held, how-

Honorable Peter H. Rea

ever, that when a railroad commission is charged with the duty of enforcing certain laws, the district attorney cannot bring suit for violation thereof without authority from the commission. An order of court to prosecute is sometimes required under statute. Want of original authority may be cured by ratification."

We will not attempt to be specific regarding the duties of the prosecuting attorney in civil matters in which the state or county may be interested but will restrict this opinion to his responsibility in regard to the State Division of Welfare. It is our view as heretofore stated the administration of the state welfare laws is vested in the State Division of Welfare which has exclusive authority in determining whether a person is or is not eligible to receive public welfare. If the State Division of Welfare requests his aid and assistance in a manner in which the State Welfare Division is a party or is interested it is his duty to represent such division.

Very truly yours,

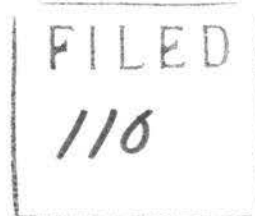
JOHN C. DANFORTH
Attorney General

Answer by letter-Klaffenbach

January 20, 1971

OPINION LETTER NO. 110

Honorable Don Owens
State Senator
District No. 20
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Owens:

This letter is in answer to your opinion request concerning the tort liability of municipal hospitals.

We have examined the cases of *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599, and *Garnier v. St. Andrew Presbyterian Church of St. Louis*, 446 S.W.2d 607, both decided by the Missouri Supreme Court en banc in November, 1969 and find nothing in either case that affects the long standing Missouri rule with respect to the immunity of municipal hospitals. In *Schroeder v. City of St. Louis* (Mo. 1950) 228 S.W.2d 677, the court held that the operation of a city hospital by the City of St. Louis constituted a governmental function and the city was protected by the doctrine of sovereign immunity.

As you no doubt know, Section 71.185, RSMo 1969, expressly permits recovery to the limits of existing insurance. This section states in full:

"1. Any municipality engaged in the exercise of governmental functions may carry liability insurance and pay the premiums therefor to insure such municipality and their employees against claims or causes of action for property damage or personal injuries, including death, caused while in the exercise of the governmental functions, and shall be liable as in other cases

Honorable Don Owens

of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

"2. In all suits brought against the municipality for tort damages suffered by anyone while the municipality is engaged in the exercise of governmental functions, it shall be unlawful for the amount of insurance so carried to be shown in evidence, but the court shall be informed thereof and shall reduce any verdict rendered by a jury for an amount in excess of such insurance to the amount of the insurance coverage for the claim."

Yours very truly,

JOHN C. DANFORTH
Attorney General

TAXATION (INCOME):

Section 143.140, RSMo 1969, does not authorize a deduction from gross income, in determining net income for income tax purposes, of amounts paid into a retirement plan trust by self-employed individuals.

OPINION NO. 111

April 15, 1971

Honorable Maurice Schechter
Senator, 13th District
41 Country Fair Lane
Creve Coeur, Missouri 63141



Dear Senator Schechter:

This official opinion is rendered pursuant to the request contained in your letter concerning the treatment, under the Missouri Income Tax Law, of retirement plan trusts created by self-employed persons.

More specifically, the question raised by your letter is whether or not Section 143.140, RSMo, as amended by Senate Bill No. 318, A.L.1959, authorizes the deduction from gross income in computing income tax liability of amounts paid into self-employment retirement plans.

The law as originally enacted (L.1941, p.690, §11347A) provided as follows:

"A trust created by an employer and employees as part of a stock bonus, pension or profit-sharing plan, for the exclusive benefit of employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees, the earnings and principal of the fund accumulated by the trust in accordance with such plan, . . . shall not be taxable under sections 143.030 to 143.080, but the amount actually distributed, or made available to any distributee shall be taxable to him in the year in which so distributed or made available, to the extent that it exceeds the total amount theretofore paid in by him."

In 1959, this section of the statute was amended by adding in the first paragraph thereof the following language:

" . . . or a trust consisting solely of one or more restricted retirement funds, created for one or more self-employed persons as part of a retirement plan for the exclusive benefit of such self-employed person or persons, to which contributions are made by such self-employed person or persons, for the purpose of distributing to such self-employed person or persons, the earnings and principal of the fund accumulated by the trust in accordance with such plan, . . . " (S.B.318, A.L.1959)

It should be observed that Section 143.140 relates to the exemption from income taxation of the earnings and principal of certain trust entities. It does not expressly authorize a deduction to anyone for amounts contributed or paid into such retirement plan trusts. It is well settled that deductions in computing income taxes are a matter of legislative grace and cannot be granted in the absence of specific legislative authority. Mertens Law of Federal Income Taxation, Section 3.08. Furthermore, in our opinion, the language of Section 143.140 is unambiguous, therefore it must be construed in accordance with its manifest intent without reaching for a meaning beyond the statute itself. State ex rel. Bell v. Phillips Petroleum Co., 160 S.W.2d 764, 349 Mo.360; State ex rel. Allen v. Yeaman (App.1969) 440 S.W.2d 138. Inasmuch as the language of this statute clearly provides for the exemption of the earnings and principal of these trusts but fails to provide for a deduction of amounts contributed to the fund, the authority for deduction, if any exists, must be found elsewhere in the law.

No express provision is made in the law for deduction of amounts paid into employee retirement trusts created for self-employed persons or otherwise. However, Section 143.160, RSMo 1969, relating to deductions does authorize the deduction of certain expenses, stating:

"1. In ascertaining net income there may be deducted from gross income derived during the same period the following:

(1) Expenses: All of the ordinary and necessary expenses . . . paid within the year in the maintenance and operation of the taxpayer's business and properties, . . . "

Under the provisions of this section amounts paid by an employer (whether corporate, partnership, individual or otherwise) to an employee trust are sometimes allowed as a deduction from gross income as ordinary and necessary business expenses. (C.C.H. State Tax Reporter, Missouri, Paragraphs 10-600, 11-901). This, however, does not apply in the case of self-employed persons where the usual common law employer-employee relationship does not exist.

Honorable Maurice Schechter

The federal law contains special provisions allowing deduction of contributions by self-employed persons to qualified pension or retirement plans. The Self-Employed Individuals Tax Retirement Act of 1962 (76 Stat.809) effective with respect to taxable years beginning after December 31, 1962, permits all self-employed individuals, who choose to do so, to be covered by a qualified pension or profit sharing plan in much the same way as employees are covered. This law gives self-employed individuals, including partners, the benefit of current tax deductions for contributions to a qualified retirement plan. At the same time, the Act permits a tax-free buildup of pension fund investments. No income will be taxed until it is distributed or made available to the self-employed individual or his beneficiary. (Internal Revenue Code 1954, §404).

There is no counterpart in the Missouri statutes authorizing deduction of such contributions. As indicated above, Section 143.140, RSMo 1969, does allow the tax free buildup of trust funds created by self-employed individuals for retirement purposes, but the legislature has not passed laws establishing a comprehensive system as now exists with respect to federal taxpayers.

In the letter requesting an opinion of this office it is suggested that the 1959 amendment to Section 143.140 attempted to set up the same procedure for a self-employed person under Missouri law as is contained in the federal statutes. In this regard we emphasize that the Self-Employed Individuals Tax Retirement Act of 1962 did not become effective until 1963, more than three years after the Missouri amendment became law. Inasmuch as Missouri law is silent with respect to granting such deductions, it is apparent that the federal law and the Missouri law are different in this respect.

CONCLUSION

It is the opinion of this office that Section 143.140, RSMo 1969, does not authorize a deduction from gross income, in determining net income for income tax purposes, of amounts paid into a retirement plan trust by self-employed individuals.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

February 5, 1971

Answered by Letter - Klaffenbach
OPINION LETTER NO. 114

Honorable Robert H. Martin
State Representative
Nineteenth District
Room 401 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Martin:

This letter is in response to your opinion request in which you pose the following questions with respect to an interpretation of Sections 90.500, RSMo 1969, et seq., relative to public parks and park boards in cities of less than 30,000 inhabitants and second and third class cities:

- "1. Does the Park Board have authority to make purchases for park needs (tractors, tools, concessions equipment) or must they follow a city pattern of three bids or use the city purchasing department?
- "2. Must properly authenticated vouchers for payment of bills and utilities be signed by the mayor and approved by the Board of Alderman?
- "3. Can the Park Board secure ground in the name of the Park Board, or is it in the name of the city?
- "4. Is the Superintendent of Parks classified as an employee of the City or the Park Board?

Honorable Robert H. Martin

"5. In the event the City should take property through condemnation for a roadway through park property, is the Park Board to be compensated for the property as would an individual or corporation?"

In view of the holding of the Springfield Court of Appeals in Gwartney v. City of Springfield, 93 S.W.2d 62 (1936), we believe that we should dispose of your questions together rather than taking them seriatim.

That is, the Springfield Court of Appeals in the Gwartney case cited and passed on the statutory provisions relative to the powers of the park board which are now contained in Section 90.550, RSMo 1969.

For the sake of simplicity, we will quote extensively here from the holding of the court at page 64:

"In saying what we have above we are not unmindful of the provisions of section 14244, Mo.St.Ann. p. 6152, which are as follows: 'Said directors shall, immediately after appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the parks as may be expedient, not inconsistent with this article. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the park fund and of the supervision, improvement, care and custody of said parks: Provided, that all moneys received for such parks shall be deposited in the treasury of said city or village to the credit of the park fund, and shall be kept separate and apart from other moneys of such city, or village, and drawn upon by the proper officers of said city or village, upon the properly authenticated vouchers of the park board. Said board shall have power to purchase or otherwise secure grounds to be used for parks; shall have power to appoint a suitable person to take care of said parks and necessary assistants for said person, and fix their compensation, and

Honorable Robert H. Martin

shall have the power to remove such appointees; and shall in general carry out the spirit and intent of this article in establishing and maintaining public parks. (R.S.1919, § 9216.)'

"We think the exclusive control of the expenditure of moneys mentioned in that section does not mean at all that the park board is an independent organization separate and apart from the city with power to collect and spend the funds as an independent and separate municipal corporation could do. We think it means simply that its powers are separate and apart from any other board or branch of the city government. This section provides that the funds are to be kept separate and apart from other funds of the city, but the park board is not given power to draw out any part of these funds. It may make vouchers for the amount, but must submit these vouchers to the proper officers of the city, and the city officers, only, may draw upon the funds. This section says: 'Said board shall have the power to purchase or otherwise secure grounds to be used for parks,' but that does not imply that said purchases shall be separate and apart from any action on the part of the city, for the same section of the statute provides that all moneys used in connection with parks must be drawn upon by the proper officer of the city."

It is our view, therefore, that it follows in direct answer to your question that the park board must follow the same procedure as does the city with respect to the purchase of such equipment; vouchers for the payment of bills and the like must conform with the provisions relative to all vouchers of the city; park board land is held in the name of the city and the superintendent of parks is an employee of the city.

Very truly yours,

JOHN C. DANFORTH
Attorney General

TOWNSHIPS:
OFFICERS:
TOWNSHIP OFFICERS:
ELECTIONS:

The office of trustee and ex officio treasurer of a township is incompatible with the office of township collector. Section 111.091, RSMo 1969, does not authorize the county court to establish an election district which consists of two entire townships.

OPINION NO. 115

February 11, 1971

Honorable Syd Weybrew
Prosecuting Attorney
Daviness County
Daviness County Court House
Gallatin, Missouri 64640



Dear Mr. Weybrew:

This opinion is in response to your questions which are stated as follows:

"(1) May one person fill the offices of trustee, ex-officio treasurer of a township and township collector at the same time?

"(2) May a County Court under section 111.091 RSMo establish an election district which consists of two entire townships and provide a single polling place for such district?"

In response to your first question, we note that Section 65.110, RSMo 1969 provides:

"There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, one township clerk, who shall be ex officio township assessor, and two members of the township board."

Honorable Syd Weybrew

Section 65.460, RSMo 1969, provides that such township trustee and ex officio treasurer shall post bond and also provides that the township collector shall give bond and security.

Section 65.490, RSMO 1969, provides in part that the township trustee and ex officio treasurer shall:

" . . . receive from the township collector and the county collector or treasurer all road and bridge and other taxes due the township when collected by such officers, and shall receipt for the same, and shall account therefor in like manner as for other moneys in his hands belonging to the township."

We noted in our Opinion No. 24, dated June 10, 1955 to Dodds, copy enclosed, that at common law the only limitation on the number of offices one person might hold was that the offices must be compatible and consistent and that the offices of city collector and city treasurer are incompatible. There must be some inconsistency in the functions of the offices, some conflict in the duties required of the officers, as where one who has some supervision of the other, is required to deal with, control, or assist him. The reasoning and the rule is well stated in State ex rel. Walker v. Bus, 36 S.W. 636.

In the premises, considering that the township trustee ex officio treasurer is required under Section 65.490 to receive certain taxes and receipt for the same from the township collector, it is our view that under the common law rule these offices cannot be held by the same person because the duty of accountability creates an incompatibility.

With respect to your second question concerning Section 111.091, RSMo 1969, we note that that section provides:

"The county courts of the several counties in this state may divide any township in their respective counties into two or more election districts, or may establish two or more election precincts in any township or may establish election districts which consist of contiguous portions of two adjoining townships, and may alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."
(Emphasis added.)

Section 1.090 with respect to the construction of statutes provides:

Honorable Syd Weybrew

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

In our view the word "portion" must be taken in its ordinary and accepted meaning. The word is defined in Ballentine's Law Dictionary, 1948 Edition p. 984 as follows:

"In its commonly accepted meaning, the word is equivalent of part, share, or division."

Other authoritative texts including constructions of the term "portion" in Words and Phrases support the definition quoted above.

We therefore conclude with respect to your second question that the legislature by enacting Section 111.091 did not intend to authorize the county court to establish an election district which consists of two entire townships.

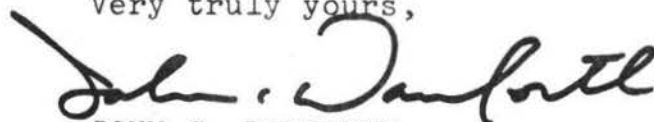
CONCLUSION

It is the opinion of this office that:

1. The office of trustee and ex officio treasurer of a township is incompatible with the office of township collector.
2. Section 111.091, RSMo 1969, does not authorize the county court to establish an election district which consists of two entire townships.

The foregoing opinion, which I hereby approve, was prepared by my Assistant John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 24
6-10-55, Dodds

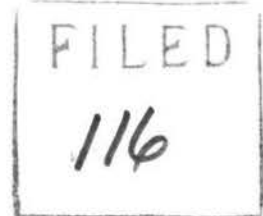
COUNTIES:
COUNTY COURT:

The action of the county court of Madison County donating five hundred dollars to a Joint Committee for Transportation for the purpose of opposing a proceeding before the Interstate Commerce Commission for abandonment of a railroad was illegal and void.

OPINION NO. 116

February 11, 1971

Honorable John W. Reid II
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Reid:

This is in response to your request for an opinion from this office as follows:

"Missouri Pacific Railroad paid \$43,421.55 in taxes to Madison County for the year 1970. Missouri Pacific Railroad has filed with the Interstate Commerce Commission a proceeding to abandon its rail service in Madison County, Missouri, as well as adjoining counties. On November 30, 1970, the Madison County Court authorized a \$500.00 donation to the Joint Committee for Transportation for the purpose of keeping the Missouri Pacific Railroad in Madison County. I have enclosed a certified copy of the Minutes of the County Court and also a copy of the cancelled check.

"Question 1: Is it permissible for a County Court of a Third Class County to pay out of general revenue a \$500.00 donation to the Joint Committee for Transportation whose purpose is to fight a rail abandonment which was filed with the Interstate Commerce Commission by a railroad wanting to discontinue its line in said county?

"Question 2: If a donation as described in Question 1 is permissible, under the Missouri Law by the County Court, can the County Court of a Third Class County make said donations without budgeting for said donation?

Honorable John W. Reid II

"Question 3: If a donation as described in Question 1 is permissible, can said donation be made by the County Court at a time when its members know the general revenue fund will not receive enough revenue for the current year to pay off the Tax Anticipation Notes?

"I appreciate your cooperation on this matter, and would like to have an opinion of the above three questions as soon as possible, due to the fact that the County Court which took office January 1, 1971, finds that approximately \$11,000.00 of the 1970 Tax Anticipation notes can not be paid

"In other words, the County spent approximately \$11,000.00 more out of the general revenue fund than it received."

Madison County is a third class county.

In your first question you inquire whether it is permissible for a county court of a third class county to pay out of general revenue five hundred dollars as a donation to the Joint Committee for Transportation whose purpose is to fight a railroad abandonment proceeding filed with the Interstate Commerce Commission by a railroad wanting to discontinue its line in said county.

We are enclosing herewith Opinion No. 75 issued by this office on February 29, 1952, to Honorable James T. Riley, Prosecuting Attorney of Cole County, Missouri, holding a county court has no authority to give public funds to a private corporation.

You enclose a certified copy of the minutes of the county court which is as follows:

"Richard Ferguson appears before Court about donation to keep Railroad in Madison County. Mr. Ferguson stated, December 15th. was deadline for all donations. The Court agreed to give \$500.00 check payable to, Joint Committee for Transportation, mail to Raymond Skaggs, P. O. Box 346, Fredericktown, Missouri."

In State ex rel. Floyd v. Philpot, 266 S.W.2d 704, 710, the jurisdiction and authority of county courts is described as follows:

"County Courts are not now named among the 'constitutional courts' in which the judicial

Honorable John W. Reid II

power of the state is vested, Article V, Constitution of Missouri 1945, V.A.M.S., but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law'. Section 7, Article VI, Constitution of Missouri 1945, V.A.M.S. The authorities are uniform to the effect that, outside of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. Rippeto v. Thompson, 358 Mo. 721, 216 S.W.2d 505, 508; Bradford v. Phelps Co., 357 Mo. 830, 210 S.W.2d 996, 999; Lancaster v. Atchison Co., 352 Mo. 1039, 180 S.W.2d 706, 708; State ex rel. Walther v. Johnson, 351 Mo. 293, 173 S.W.2d 411, 413." (Emphasis supplied)

In the above case, the Supreme Court held the county court of Douglas County had no authority whatever to determine whether an applicant for a state liquor license to sell intoxicating liquor at retail in Douglas County had met the statutory qualifications. The court held that under the statute these matters were to be determined by the State Supervisor of Liquor Control and that the county court had no discretion whatsoever.

Section 432.070, RSMo 1969, provides as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

In Thies v. St. Louis County, 402 S.W.2d 376, the Supreme Court held in this statutory provision that a contract made by a county, shall be in writing and subscribed by the parties thereto or their agents, is mandatory.

The above order made by the county court certainly does not comply with this statutory provision, and it cannot be considered

Honorable John W. Reid II

as a valid contract by the county. Cook v. St. Francois County, 162 S.W.2d 252; Becker v. St. Francois County, 421 S.W.2d 779; Edwards v. City of Kirkwood, 147 Mo.App. 599.

Since this is not a valid contract for the payment of public funds, it must be considered as a donation or gift.

We are unable to find any statute authorizing a county to grant or donate public funds for the purpose as stated herein.

In Ruggeri v. City of St. Louis, 429 S.W.2d 765, the issue presented to the Supreme Court was an ordinance passed by the City of St. Louis levying a tax on patrons of all motels, hotels and restaurants. The ordinance provided for the proceeds of the tax to be turned over to the Convention and Tourist Board of Greater St. Louis, a pro forma decree corporation, and to be used by it for the purpose of inviting and encouraging conventions and other public meetings to be held in the City of St. Louis. Although the proceeds of the tax was to be paid over to the private corporation for a definite purpose, the Supreme Court held the ordinance was invalid as being in conflict with Article X, Section 3 and Article VI, Section 25 of the Constitution of Missouri as a donation of public funds to a private corporation.

Although the above case dealt with the authority of a municipality to donate public funds, the same constitutional provision applies to the acts of a county in donating public funds.

In answer to your first question whether the action of the county court of Madison County in donating five hundred dollars to the Joint Committee for Transportation to be used in opposing a proceeding before the Interstate Commerce Commission for abandonment of a railroad is permissible, in our opinion it is not.

In view of our answer to your first question, the other questions you submit are moot.

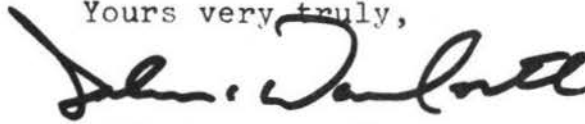
CONCLUSION

It is the opinion of this office that the action of the county court of Madison County donating five hundred dollars to a Joint Committee for Transportation for the purpose of opposing a proceeding before the Interstate Commerce Commission for abandonment of a railroad was illegal and void.

Honorable John W. Reid II

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 75
2-29-52, Riley

COURTS:
JUVENILES:

1. In counties of the second class in which there is no judge assigned exclusively to juvenile matters, the courtroom designated for juvenile cases may be used by the court for other matters when the juvenile court is not in session. 2. The county court of a second class county may construct a single building containing completely separate units for housing the juvenile detention center and the county jail if the building is constructed and arranged so that a child being detained does not come in contact at any time or in any manner with adults being held in the county jail.

OPINION NO. 118

April 26, 1971

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
225 North Clark
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This is in response to your request for an opinion on questions relating to the construction of a juvenile detention home. Your first question is presented as follows:

"My specific question is whether or not, if a new juvenile detention facility is constructed, does the County Court have to construct a separate courtroom to be used exclusively for the hearing of juvenile cases under Chapter 211?"

As indicated in your opinion request, Cape Girardeau is a second class county. Juvenile courtrooms are referred to in Section 211.291(1), RSMo 1969, as follows:

"1. In counties of the first and second class and in the city of St. Louis a court room, to be designated the juvenile court room, shall be provided by the county or circuit court of the county or city, as the case may be, for the hearing of cases under this chapter."

The Cape Girardeau Court of Common Pleas has concurrent jurisdiction with the circuit court in the treatment, correction and confinement of delinquent minors. Section 480.020, RSMo 1969, provides in pertinent part as follows:

Honorable A. J. Seier

"The said court of common pleas shall be held within the city of Cape Girardeau, and shall have power and jurisdiction within the city, township and county of Cape Girardeau, as follows:

"(1) Concurrent original jurisdiction in all civil actions at law or in equity with the circuit court of said county, and concurrent jurisdiction with the circuit court of said county in the treatment, correction and confinement of delinquent minors;"

Section 211.021(3), RSMo 1969, provides as follows:

"'Juvenile court' means the Cape Girardeau court of common pleas and the circuit court of each county, except that in the judicial circuits having more than one judge, the term means the juvenile division of the circuit court of the county;"

It appears, therefore, that in Cape Girardeau County the juvenile court is the court of common pleas and the circuit court. Under Section 480.110, RSMo 1969, the judge of Judicial Circuit No. 32 is the judge of the court of common pleas. Accordingly, when acting on matters pertaining to the treatment, correction and confinement of delinquent minors, the circuit court and the common pleas court constitute the juvenile courts, and the courtrooms used by such courts constitute the juvenile courtrooms.

It is our view that the legislative intent in enacting Section 211.291(1), was to make certain that a suitable room for hearing juvenile cases is provided in St. Louis City and in all first and second class counties.

In counties in which a circuit judge has been designated to devote his entire time to juvenile matters, a separate juvenile courtroom is provided; but in counties in which there is not a circuit judge assigned exclusively to juvenile matters, the furnishing of a room in which juvenile cases are heard, in addition to the other cases heard by the circuit court, is sufficient. The requirement of the statute is met when adequate facilities for juvenile hearings are provided and the statute does not prohibit the use of the juvenile courtroom by the circuit court or the court of common pleas for other matters when the juvenile court is not in session.

Honorable A. J. Seier

It follows, therefore, that in answer to your first question the same courtroom may be used by the Cape Girardeau Court of Common Pleas and the circuit court when exercising their general jurisdiction and when acting as the juvenile courts.

Your next question is presented as follows:

"The Second section which we would appreciate an opinion on involved Section 211.331 (2) which indicates that the place of detention:

'Shall be so located and arranged that the child being detained does not come in contact, at any time or in any manner, with adults convicted or under arrest, and the care of children in detention shall be as closely as possible as the care of children in good homes.'

"The County Court is considering the construction of a building which would house both a county jail and a juvenile detention center. The juvenile detention center would be separate in that there would be no common entrance to the jail and juvenile detention center but that there may be a common kitchen for the use of both the jail and the detention center. The entrances, as I said, would be separate and there would be a partition in the building itself which would separate the two facilities. However, as indicated, they would be in the same building."

It is to be observed that the structural formula which the statute prescribes for the place of detention is that the place of detention shall be so located and arranged that the child being detained does not come in contact with adults who are charged with or convicted of crime. We understand that the structure described in your opinion request would be treated as a single building in respect to serving it with utilities such as heat, light and water, but as two separate units with respect to occupancy. That is to say, from the standpoint of occupancy, the building will comprise two separate units that are not interconnected by corridors or passageways but have separate entrances and are otherwise arranged and constructed in a manner to prevent access from one unit to another. In that respect, the building described in your opinion request is similar to the apartment houses that contain economical but separate dwelling units for many families in our large cities.

Honorable A. J. Seier

It appears that the place of detention described in your opinion request would be constructed and arranged to prevent all physical contact, communication or action of any kind between juvenile and adult offenders. Accordingly, if there is no way in which the juveniles in the detention facilities could be influenced or affected by the conduct, conditions or language of any of the adults confined in the county jail such an arrangement would not violate the provisions of Section 211.331, RSMo 1969.

CONCLUSION

It is the opinion of this office that:

1. In counties of the second class in which there is no judge assigned exclusively to juvenile matters, the courtroom designated for juvenile cases may be used by the court for other matters when the juvenile court is not in session.

2. The county court of a second class county may construct a single building containing completely separate units for housing the juvenile detention center and the county jail if the building is constructed and arranged so that a child being detained does not come in contact at any time or in any manner with adults being held in the county jail.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
GENERAL ASSEMBLY:

Bills introduced at one session of
the General Assembly may be considered
at subsequent sessions of the same

General Assembly provided the rules of the house concerned permit consideration of the bills and the bills concern subject matter which constitutionally can be considered at such sessions. However, bills introduced in one General Assembly do not carry over to a subsequent General Assembly.

OPINION NO. 119

February 19, 1971

Honorable Robert Young
Representative, District 133
Room 203C, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Young:

You have requested the opinion of this office on the following questions:

"1. Is it possible to consider again a bill, not on the calendar, but first introduced in a regular session of the general assembly held in the odd-numbered year at either of the following times:

(1) During the regular session of that general assembly held in the even-numbered year; or

(2) During an extraordinary session held between the regular sessions (assuming the subject matter of the bill to be within the governor's call)?

"2. If it is possible in either event to reconsider such a bill, what procedures must be followed?

II

"1. Is it possible to consider again a bill first introduced in a regular session of the general assembly held in an odd-numbered year and automatically tabled under the provisions of Section 20(a), Article III, Constitution of Missouri, at either of the following times:

Honorable Robert Young

(1) During the regular session of that general assembly held in the even-numbered year; or

(2) During an extraordinary session held between the regular sessions (assuming the subject matter of the bill to be within the governor's call)?

"2. If it is possible in either event to reconsider such a bill, what procedures must be followed?

III

"1. Is it possible in any event to consider a bill introduced but not on the calendar, or a bill remaining on the calendar of the regular session beginning in even-numbered years and automatically tabled by the provisions of Section 20(a), Article III, Constitution of Missouri?

"2. If such consideration is possible, what procedures must be followed?"

I

With respect to your first two questions, the initial inquiry is to determine if the Constitution of Missouri places any limitations on consideration at a subsequent session of the same General Assembly of: (1) bills introduced at a prior session, but not on the calendar when that session adjourns; and, (2) bills introduced at a prior session which were pending on the calendar at the time the session adjourned.

In the case of bills pending on the calendar at the session required by the Constitution to be held in January of each year, Article III, Section 20(a) specifically provides that such bills are tabled on the compulsory date for adjournment. We find that the provision for tabling bills on the calendar is similar to the provision that existed in Article III, Section 20(a) prior to the most recent amendment of that section which was adopted at the November 3, 1970 general election. We believe that such a provision is intended to prohibit the General Assembly from considering bills generally, while it is in session only for the limited purpose of enrolling, engrossing, and signing bills which were passed prior to adjournment; that is, while it is in session for the period between June fifteenth and June thirtieth in odd-numbered years and the period between April thirtieth and May fifteenth in even-numbered years. We do not read Article III, Section 20(a) to prevent the

Honorable Robert Young

General Assembly from removing such bills from the table for consideration when it reconvenes in a subsequent session; provided the Constitution, itself, does not limit the scope of matters that may be considered by the General Assembly during any particular subsequent session.

With respect to bills introduced, but not on the calendar at the time a session of the General Assembly adjourns, we find no constitutional prohibition against consideration of such bills at a subsequent session; provided, consideration of the subject matter of such bills is not precluded by other constitutional provisions. In fact, Article III, Section 22 specifically provides that each house may by rule provide for committees to meet and consider bills during the interim between the session ending on the thirtieth day of June in odd-numbered years and the session commencing on the first Wednesday after the first Monday of January in even-numbered years.

In arriving at the conclusion that there is no constitutional prohibition against carrying over bills from one session of the General Assembly to a subsequent session of the same General Assembly, we have considered as precedent the United States Constitution. Amendment XX, Section 2 provides:

"The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."

We believe that the people of Missouri in amending Article III of the State Constitution, on November 3, 1970, intended to have annual sessions of the Missouri General Assembly similar to the annual sessions that the Congress of the United States is required to hold under Amendment XX, Section 2 of the United States Constitution. We find by reference to the rules of the United States Senate, that the Senate has a rule which permits the Senate to consider matters at a new session of the same Congress that were pending at a prior session of that Congress as if there had been no adjournment. Senate Rule XXXII. We find this rule persuasive authority that the Constitution of the United States does not prohibit Congress from considering the matters pending at the adjournment of one session in a subsequent session. Also, in accord is Hinds' Precedents of the House of Representatives, Section 6727. We find nothing in the language of the Missouri Constitution that would compel a different conclusion with respect to the Missouri General Assembly.

Having found no constitutional reason why bills may not be carried over from one session to succeeding sessions, we are faced with the second part of each of your first two questions, to-wit: What procedure must be followed to consider bills introduced in one

Honorable Robert Young

session at subsequent sessions? Article III, Section 18 of the Constitution provides that each house may determine the rules of its own proceedings except when inconsistent with the Constitution. Inasmuch as the Constitution does not specify the procedure to be followed in considering bills at a subsequent session, this is a matter to be determined by each house pursuant to its own rules. The power to make rules carries with it the power to interpret those rules. Since each house of the General Assembly is vested with that power by the Constitution, respect for the provisions of Article II, Section 1, dividing the government into three distinct departments, precludes this office from advising the legislative department on the question of how its rules should be interpreted; and therefore, we are without power to indicate the procedure under the rules of each house to be followed in considering bills introduced in one session at a subsequent session.

II

In answer to your third question, we are of the opinion that the business of the General Assembly is at an end when the next General Assembly convenes on the first Wednesday after the first Monday in January following the general election. Each General Assembly constitutes a separate and distinct legislative body; and therefore, all bills introduced in a General Assembly terminate when such General Assembly ceases to exist. See, Jefferson's Manual, Section LI.

However, if bills have been introduced but are not on the calendar, or bills remain on the calendar when the even-year session of the General Assembly adjourns sine die under the provisions of Article III, Section 20(a), we are of the opinion that those bills may be considered, as if there had been no adjournment, in a special session called by the Governor; provided, the subject matter of the bills is within the scope of the Governor's call and further provided, that the rules of the house concerned provide for the consideration of such bills.

CONCLUSION

It is the opinion of this office that bills introduced at one session of the General Assembly may be considered at subsequent sessions of the same General Assembly provided the rules of the house concerned permit consideration of the bills and the bills concern subject matter which constitutionally can be considered at such sessions. However, bills introduced in one General Assembly do not carry over to a subsequent General Assembly.

Honorable Robert Young

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

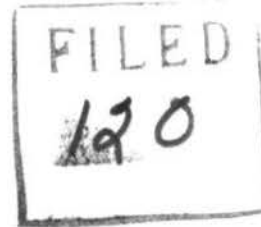
JOHN C. DANFORTH
Attorney General

March 12, 1971

Opinion Letter No. 120

Answer by Letter (Klaffenbach)

Mr. J. M. Wilson
Assistant Prosecuting Attorney
Scott County
217 South Kingshighway
Sikeston, Missouri 63801



Dear Mr. Wilson:

This letter is in answer to your opinion request in which your question is stated as follows:

"I would like to request an opinion from your office concerning what constitutes use of criminal process to collect a private debt as such would subject the officers of the Court to liability.

When our office is approached by small loan and furniture companies advising that someone has carried mortgaged property out of the state and refused to pay, our procedure is to write a letter informing the mortgagor that the acts he has committed may subject him to criminal liability. Since most people are unaware that criminal charges can be brought against them it is our feeling that they should have an opportunity with full knowledge, to dispel the intent to defraud. My attention has been called to an article in the American Law Review Third, 27 ALR 3rd 1202. If after receiving the above notice an agreement is made with the mortgagee or payment is made we do not process complaint.

In your opinion does this constitute use of criminal process to collect a debt."

It is our understanding that the section of the Missouri Statutes to which you refer concerning the disposition of mortgaged chattels is Section 561.570 RSMo. 1969 which states:

"Every debtor in any security agreement or trust deed of personal property who shall sell, convey or dispose of the property mentioned in the security agreement or trust deed or any part thereof, without the written consent

Mr. J. M. Wilson

of the secured party or beneficiary and without informing the person to whom the same is sold or conveyed that the property is subject to the security interest or who shall injure or destroy the property or any part thereof or aid or abet the same, for the purpose of defrauding the secured party or beneficiary or his heirs or assigns or shall remove or conceal or aid or abet in removing or concealing the property or any part thereof, with intent to hinder, delay or defraud the secured party or beneficiary, his heirs or assigns, shall, if the property is of the value of fifty dollars or more, upon conviction thereof, be punished by imprisonment by the department of corrections not exceeding five years, or by imprisonment in the county jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both the fine and imprisonment in the county jail; and if the property is of less a value than fifty dollars he shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail not exceeding six months or by a fine not exceeding one hundred dollars or by both the fine and imprisonment."

It is also our understanding from additional correspondence from you that the cases involve instances where the person not only removes the property from the State of Missouri but also refuses to give a forwarding address, does not make any attempt to continue payments on the property and in effect substantially attempts to hide himself and the mortgaged property from his creditors.

27 ALR 3rd 1202 which is cited in your question concerns the use of criminal process to collect debts. In our view the letters you state that you write by themselves do not come within the theory of abuse of process.

Although this would appear to answer your question we believe that you want us to explore the situation further.

That is, malicious prosecution is another theory of action which is distinguishable from an action for malicious arrest or from malicious abuse of process or malicious use of process and other actions of a similar nature. 54 C.J.S. Malicious Prosecution, #2. However in this instance no prosecution has been commenced therefore there does not appear to be a theory which could be founded upon "malicious prosecution".

We also note that Section 559.450 RSMo. 1969 with respect to threatening letters states:

"Every person who shall knowingly send or deliver any letter,

Mr. J. M. Wilson

writing, printing, circular or card, with or without a name subscribed thereto, or signed with a fictitious name, or any letter, mark or device, threatening to accuse any person of a crime, or to kill, maim or wound any person, or to do any injury to the person, property, credit or reputation of another, though no money or property be demanded or extorted thereby, shall, on conviction, be adjudged guilty of a misdemeanor."

There is little Missouri authority on the interpretation of this section. However its application should be considered in this instance.

Another section of possible application which is self-explanatory is Section 560.130 RSMo. 1969 concerning robbery in the third degree which states:

"If any person shall, either verbally or by a written or printed communication, accuse or threaten to accuse another of a felony, or shall threaten to do any injury to the person or property whatever of anyone, with a view or intent to extort or gain any money or property of any description belonging to another, and shall, by intimidating him with said accusation or threat, extort or gain from him any money or property, every such offender shall be deemed guilty of robbery in the third degree."

In addition obviously any time a public officer abuses his position he will have to consider whether or not he is in violation of Section 558.110 RSMo. 1969, with respect to oppression in office, which states:

"Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Finally with respect to the general subject of threats, we refer you to 86 C.J.S., Threats and Unlawful Communications, §3.

It is obvious of course that the particular facts in each case must be individually considered and for that reason we do not attempt to speculatively determine at what point an official exceeds the bounds of propriety and enters the area of criminal and civil liability.

In our view it is not proper for the prosecuting attorney to base his decision as to whether to prosecute upon whether

Mr. J. M. Wilson

an account or alleged debt is paid. We find no advisory opinion from the Missouri Bar Advisory Committee on this precise subject and are informed that there is none.

We conclude that it is the duty of the prosecutor to determine whether or not he should prosecute and he should clearly not involve himself in any commercial dealings between the complainant and the other party.

Very truly yours,

JOHN C. DANFORTH
Attorney General

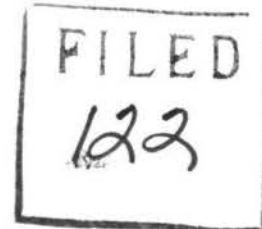
COUNTY TREASURER:
TAXATION (INTANGIBLE):

As to the amounts returned by the State Director of Revenue, collected as intangible taxes, these amounts are to be set apart and credited to the specific levy, in pro rata amounts, which provides the political subdivision's taxable basis. It is not incumbent upon the county treasurer of DeKalb County to set apart and credit to the specific levy providing the taxable basis the pro rata amount to be returned to each political subdivision within DeKalb County.

OPINION NO. 122

April 19, 1971

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County Court House
Maysville, Missouri 64469



Dear Mr. Paden:

This is in reply to your request for an opinion of this office in which you sought an interpretation of Section 146.110, RSMo 1969. Specifically, you request an opinion as to whether the amounts, from intangible taxes returned by the State Director of Revenue, are to be set apart and credited to the specific levy providing the taxable basis in pro rata amounts; and if so, is it incumbent upon the county treasurer to determine the pro rata distribution.

Section 146.110, reads as follows:

"The director of revenue shall annually, on or before the fifteenth day of December, return all intangible taxes collected, less two percent thereof which shall be retained by the state for collection, to the county treasury of the county in which the particular taxpayers are domiciled or in which the intangible personal property which was the subject of the tax had its business situs. A statement of the exact amount due each political subdivision as determined by applying the local rates of levy to the proceeds of the tax shall accompany each payment. The several county treasurers and the treasurer of St. Louis city are hereby directed to distribute all amounts so received from the director of revenue according to the allocations contained in the statements made by the director of revenue." (Emphasis added)

Honorable Robert B. Paden

The Supreme Court of Missouri, en banc, has interpreted the foregoing section in State ex rel. Board of Directors v. Dwyer (Mo. Sup. en banc 1950) 234 S.W.2d 604. That case involved an original proceeding in mandamus before the Supreme Court of Missouri en banc, against the treasurer of the City of St. Louis, to require said treasurer to set apart for the Library Fund of the city free public library, a percentage of the amounts received from the State Director of Revenue for taxes collected pursuant to now Section 146.110. The court, in discussing the purposes to which the money collected as intangible taxes is to be put, stated as follows:

" . . . However, the people voted this part of the City levy for the Library Fund; and, since the City had the right to have it considered in fixing its proportion of the taxes collected by the State at 175/266 in 1946, we see no reason why it should not have the right, and duty, to use the 4/266 (4/175 of its part), thus added and received, for the purpose for which the people voted it. . . ." (loc. cit. 607, emphasis added)

Additionally, on motion for rehearing in discussing the purposes to which the City of St. Louis was to put the amounts returned to it from the State Director of Revenue, the court stated:

" . . . The Constitution, Sec. 4(c), art. X, Mo.R.S.A., requires the return of the intangible tax 'to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy.' The other 1945 Acts, cited in our opinion, provide how this shall be done. Harmonizing all of these provisions, we think it is clear that the rate of taxation on the assessed valuation of property, subject to ad valorem taxation, is intended to provide the basis for determining the amount and use of intangible tax revenue returned to each political subdivision; and we so rule." (loc. cit. 607, emphasis the Court's)

From the foregoing, it is the conclusion of this office that as to the amounts returned by the State Director of Revenue, collected as intangible taxes, these amounts are to be set apart and credited to the specific levy, in pro rata amounts, which provides the political subdivision's taxable basis.

Honorable Robert B. Paden

In light of our foregoing conclusion, you ask who is the proper official to specifically set aside the pro rata amount for distribution. In discussing this question, in State ex rel. Board of Directors v. Dwyer, supra, the Supreme Court stated as follows:

" . . . Sec. 4, art. X, only provides that the Director of Revenue shall return the taxes he collects 'to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy.' It does not say for what purposes the taxes should thereafter be used by the political subdivision to which they are allocated; and it does not authorize the Director to decide that matter. . . ." (loc. cit. 606)

Thus, it is apparent, that it is not incumbent upon the State Director of Revenue to determine the pro rata distributions which is to be set aside and credited to the specific levy providing the taxable basis. The same reasoning would apply to the county treasurer, and thus, it is our conclusion that it is not incumbent upon the county treasurer of DeKalb County to set apart and credit to the specific levy providing the taxable basis the pro rata amount to be returned to each political subdivision within DeKalb County.

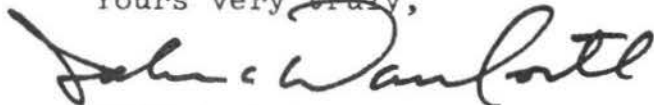
CONCLUSION

From the foregoing, it is the conclusion of this office that as to the amounts returned by the State Director of Revenue, collected as intangible taxes, these amounts are to be set apart and credited to the specific levy, in pro rata amounts, which provides the political subdivision's taxable basis.

It is not incumbent upon the county treasurer of DeKalb County to set apart and credit to the specific levy providing the taxable basis the pro rata amount to be returned to each political subdivision within DeKalb County.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

COUNTY OPTION DUMPING GROUND LAW:
COUNTY COURT:
LICENSES:
DUMP GROUNDS:

The county court of a second-class county has a ministerial duty to renew a license once issued under the County Option Dumping Law, on the tender by the licensee of the annual fee of twenty-five dollars, (1) To renew a license to operate a disposal area under the County Option Dumping Law, which has initially complied with the application procedure set out in Section 64.467, and 64.470(1), and (2) the licensee need but pay the annual fee of twenty-five dollars.

OPINION NO. 123

March 23, 1971

Honorable Joe A. Johnson
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Johnson:

This is in reply to your request for an opinion of this office in which you requested as follows:

"May the County Court of a second-class county refuse the renewal of a license to conduct a sanitary landfill when the requirements stated in the Statutes, namely application and tender of license fee and approval by the Division of Health has been made, or, is the granting of the renewal automatic and requires only an administrative approval by the County Court."

Honorable Joe A. Johnson

We consider this a request which asks the procedure to be followed in renewing a license previously issued pursuant to the County Option Dumping Ground Law, Section 64.460 through 64.487, RSMo 1969.

The pertinent sections of the County Option Dumping Law would appear to be Sections 64.467, and 64.470, which state:

Section 64.467:

"1. Any person desiring a license to operate a disposal area shall make application therefor to the county court on forms provided by it.

"2. The application shall contain the name and residence of the applicant, the location of the proposed disposal area, and such other information as may be necessary. The application shall be accompanied by a fee of twenty-five dollars."

Section 64.470:

"1. Upon receipt of the application the county court shall notify the state division of health which shall inspect the proposed site and determine if the proposed operation complies with sections 64.460 to 64.487 and the rules and regulations adopted pursuant thereto.

"2. If the division of health reports favorably on the application, and the county court finds that the applicant is a responsible and suitable person to conduct the business, then the county court shall issue a license to the applicant.

"3. All licenses shall expire one year after issuance but may be renewed upon payment of an annual fee of twenty-five dollars."

From the foregoing it can be seen that the requisites for the issuance of a license to operate a sanitary landfill are twofold: (1) A favorable report by the Division of Health as to the sanitary standards for the area contemplated as a dumping ground, and, (2) A finding by the county court that the applicant is a responsible and suitable person for the conducting of a business of a dumping ground. That both findings are necessary, reference should be had to State v. McClary, (K.C.Ct.App. 1966), 399 S.W.2d 597.

You have indicated that the foregoing procedures have been followed and you have requested an opinion on the procedure that must be followed for the renewal of a license to operate a disposal area. The pertinent section of the County Option Dumping Law in this regard is Section 64.470(3) which states as follows:

"3. All licenses shall expire one year after issuance but may be renewed upon payment of an annual fee of twenty-five dollars."

As can be seen from the foregoing section, the licensee of a dumping ground, may exercise his discretion, and his license "may be renewed upon payment of an annual fee of twenty-five dollars." Thus, it is the conclusion of this office, that to renew a license for the operation of a disposal area under the County Option Dumping Law, the only requisite is compliance with Section 64.470(3) by the licensee, that requirement being the payment of the annual twenty-five dollar fee. This conclusion is compelled, that upon payment of the twenty-five dollar annual fee the county court has but a ministerial duty, by the fact that the statutes provide only for revocation of the license to operate a disposal area under Section 64.473, RSMo 1969, which states as follows:

"The county court may revoke any license after reasonable notice and hearing if it finds that the disposal area is not operated in a sanitary manner as required in sections 64.460 to 64.487."

Thus, it is the conclusion of this office, that to renew a license to operate a disposal area under the County Option Dumping Law, the licensee need but pay the annual fee of twenty-five dollars.

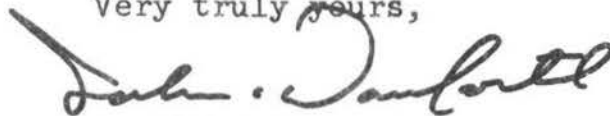
Honorable Joe A. Johnson

CONCLUSION

It is the opinion of this office that the county court of a second-class county has a ministerial duty to renew a license once issued under the County Option Dumping Law, on the tender by the licensee of the annual fee of twenty-five dollars, (1) To renew a license to operate a disposal area under the County Option Dumping Law, which has initially complied with the application procedure set out in Section 64.467, and 64.470(1), and (2) the licensee need but pay the annual fee of twenty-five dollars.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Kenneth M. Romines.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:

Subsection 1 of Section 162.096, RSMo 1969, does not authorize the State Board of Education to reconsider after January 15, 1971, assignments of non-operating districts lawfully made prior to that date.

March 2, 1971

OPINION NO. 124



Honorable W. D. Hibler, Jr.
State Representative
Ninety-third District
Room 402
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Hibler:

This is in response to your request for an opinion of this office with respect to the following question:

"I need an opinion on Section 162096 Missouri Revised Statute 1969. My question refers to the last three lines of the first paragraph of sub-section 1 of this statute.

"What I want to know is whether, when an assignment of a non-operating district has been made and announced before January 15, 1971, is it possible for the State Board of Education to reconsider their decision and assign the non-operating district concerned to an operating district different than the one to which the announced assignment was made."

Subsection 1 of Section 162.096, RSMo 1969, states as follows:

"Nonoperating districts to consolidate, when, failure, effect of -- districts to operate as six-director districts and consolidate, when, failure, effect of. -- 1. If any school district is not operating schools and has not combined its territory with that of one or more districts which do operate schools through one of the procedures provided by law within one

Honorable W. D. Hibler, Jr.

year after August 25, 1969, the state board of education shall assign the territory of the district to one or more districts which operate schools. The assignments shall be announced not later than January 15, 1971, and shall become effective on July 1, 1971."

We assume that your question is directed to the last sentence of Subsection 1 of Section 162.096 which reads as follows:

"... The assignments shall be announced not later than January 15, 1971, and shall become effective on July 1, 1971."

We interpret your question to be whether the State Board of Education can reconsider and possibly change after January 15, 1971, but before the effective date of the assignments -- July 1, 1971 -- assignments lawfully made prior to January 15, 1971.

The primary rule of statutory construction is to ascertain from the language used the intent of the legislature and to put upon the language used its plain and rational meaning in order to promote its object. Donnelly Garment Co. v. Keitel, 354 Mo. 1138, 193 S.W.2d 577, 581 (1946). Primary emphasis must be placed on the language used and all words must be considered in their ordinary and plain meaning. Section 1.090, RSMo 1969; Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 126 (1956); Playboy Club, Inc. v. Myers, 431 S.W.2d 228, 231 (Mo., 1968). When the language of the statute is explicit and unambiguous and its meaning clear and unmistakable:

"... there is neither reason nor room for judicial construction . . . and, we find nothing in Section 443.430 (or in any related statute) which would indicate a legislative intent that the non-technical and commonplace language hereinbefore quoted from the cited statute should be construed otherwise than in its natural, plain and ordinary sense and meaning, or which would afford any legitimate basis for refusal to accept and apply that language honestly and faithfully" State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 55 (Mo.App., 1957); State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S.W.2d 57, 59 (1928).

The plain and ordinary meaning of the last sentence of Subsection 1 of Section 162.096 would be that the State Board of Education shall announce the assignments not later than January 15, 1971. Certainly, there is no express authority granted to the State Board of Education

Honorable W. D. Hibler, Jr.

to announce assignments after January 15, 1971, or to change assignments after January 15, 1971.

However, it could be argued that if the direction to the State Board of Education to announce the assignments not later than January 15, 1971 is directory rather than mandatory, the State Board could reconsider and could change its assignments after January 15, 1971. The general rule is that the use of the word "shall" in a statute is construed to be mandatory. State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 944 (Mo., 1938). However, a statute fixing the time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed or phraseology of the statute is such that the designation of the time must be considered a limitation on the power of office. Mead v. Jasper County, 322 Mo. 1191, 18 S.W.2d 464, 465 (1929). In determining whether a particular statutory provision is directory or mandatory, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences which would result from construing it one way or the other. State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, 107 (1930); State ex rel. Hay v. Flynn, 235 Mo.App. 1003, 147 S.W.2d 210, 211 (1941); and State ex rel. Hanlon v. City of Maplewood, 99 S.W.2d 138, 141 (Mo., 1936).

In applying these rules to the instant case, we must determine the legislative intent behind the phrase in Section 162.096: "The assignments shall be announced not later than January 15, 1971. . .". It is the belief of this office that the legislature chose a date five and one-half months prior to July 1, 1971, for announcing the assignments of non-operating districts so that the receiving districts would have ample notice that they would be responsible for additional territory at the beginning of the school year 1971-1972. For receiving districts to have this information well in advance of the beginning of the 1971-1972 school year (July 1, 1971) is necessary for planning purposes. Most of the arrangements for a school year -- financial, personnel, transportation, etc. -- are made between January and July preceding the beginning of the new school year. For instance, under Section 165.191, RSMo 1969, it is the duty of the county superintendent of schools in each county of the State, in cooperation with the clerk of the board of the district, to prepare, not later than March 1 of each year, a detailed budget of estimated receipts and disbursements for the use of the officers and voters in connection with the problem of school tax rates. Furthermore, under Section 164.011 the school board of each district is required to prepare annually an estimate of the amount of money to be raised by taxation for the ensuing school year and the tax rate required to produce that amount. Most school districts prepare this estimate long before the date it is due -- July 15 -- so that a determination can be made whether it will be necessary to seek voter approval of a school tax rate

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increase. Also, most school boards must make a decision early in the calendar year whether it will need additional teachers for the ensuing school year. Under Section 168.126, probationary teachers must be advised on or before April 15 whether they will be retained by the school district. School transportation plans must also be made prior to July 1, particularly if new buses must be obtained.

Based on the foregoing, we conclude that the legislature instructed the State Board of Education to make the assignments of non-operating districts prior to January 15, 1971, so that all those affected by the assignments would have ample notice and could plan accordingly. If the State Board of Education were permitted to reconsider these assignments and possibly change them after January 15, uncertainty would be injected into the situation which we believe is contrary to the legislative intention.

CONCLUSION

Therefore, it is the conclusion of this office that Subsection 1 of Section 162.096, RSMo 1969, does not authorize the State Board of Education to reconsider after January 15, 1971, assignments of non-operating districts lawfully made prior to that date.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent than the last name "Danforth".

JOHN C. DANFORTH
Attorney General

March 16, 1971

OPINION LETTER NO. 125
Answer by Letter (Mansur)

Mr. Walter G. Sartorius
Chairman
Board of Probation and Parole
P. O. Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in response to your request for an opinion from this office for our interpretation of Article VII, Section 8, Constitution of Missouri, which provides as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

You inquire whether a clerical employee of the State Board of Probation and Parole is required to be a resident of this state under the above constitutional provision.

We are enclosing herewith Opinion No. 66, issued by this office on May 14, 1948 to the State Board of Training Schools holding that employees of the State Board of Training Schools do not have to be residents of the state. This opinion sets out the constitutional provisions above referred to and to certain decisions of the appellate courts of this state which have construed the above constitutional provisions and the general principles of law involved. We believe this opinion correctly states the law at the present time.

Mr. Walter G. Sartorius

It is our view that only persons elected or appointed to public office in this state are required to be residents of the state under the above constitutional provisions. It does not apply to employees of the state. They are not required to be residents unless expressly required by statute.

We can find no statute expressly requiring employees of the State Board of Probation and Parole to be residents of this state. Therefore, it is our opinion that clerical employees of the State Board of Probation and Parole are not required to be residents of the state.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion No. 66
5-14-48,

CITIES, TOWNS & VILLAGES:

The alternative procedure authorized in Section 72.085, RSMo 1969, for incorporating cities in any second class county or first class county having a charter form of government, may not be used in place of the procedure prescribed in Section 72.100, RSMo 1969, for the incorporation of unincorporated areas situated on the county line and in two counties.

OPINION NO. 126

April 12, 1971

Honorable Donald J. Gralike
Representative, District 49
Room 301, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gralike:

This is in response to your request for an opinion concerning the procedure to be followed for the incorporation of an unincorporated area located in part in St. Louis County and in part in a second class county.

In your opinion request you point out that the procedure for incorporating cities and towns situated on a county line and in two counties is provided in Section 72.100, RSMo 1969, and an alternative procedure for incorporating areas in second class counties and first class counties having a charter form of government is provided in Section 72.085, RSMo 1969. Your basic question is whether use of the alternative procedure under Section 72.085 is restricted to the situation where all of the area to be incorporated is located in one county, or whether the alternative procedure may be used for the incorporation of areas located partly in a first class county having a charter form of government and partly in a second class county.

Section 72.085, RSMo 1969, is as follows:

"1. Other provisions of law notwithstanding, any unincorporated area of land in any second class county or first class county having a charter form of government may become a city of the class to which its population would entitle it, as provided in this chapter, and be incorporated in the manner provided by this section.

"2. Incorporation proceeding may be instituted by the filing of a petition with the governing

Honorable Donald J. Gralike

body of such county. The petition shall be signed by ten percent of the registered voters in the area, shall describe, by metes and bounds, the area to be incorporated and be accompanied by a plat thereof, shall state the approximate population and the assessed valuation of all real and personal property in the area and shall state facts showing whether or not the incorporation is reasonable and necessary to the proper development of the area, the ability of the proposed city to furnish normal municipal services in the area within a reasonable time after its incorporation is to become effective and whether or not the incorporation is in the interest of such county as a whole.

"3. After public hearing and review of the proposed incorporation, the governing body of the county may, by ordinance or order, approve or disapprove the petition in whole or in part, with or without amendment, including, but not limited to, increasing or decreasing the area to be incorporated, and upon such approval shall submit the proposal for incorporation to the qualified voters in the area proposed to be incorporated. The governing body of the county in such ordinance or order shall set the date for such election at any special, primary or general election not less than sixty days after the enactment of the ordinance or order. The election official or officials in charge of elections in such county shall submit the proposed incorporation at the election by ballot substantially in the form set forth in the ordinance or order calling the election. If the proposed incorporation is approved by a majority of the voters voting thereon in the area to be incorporated, the city shall thereupon be incorporated. If a majority of those voting thereon vote against the incorporation the proposal shall be defeated and no new petition for incorporation of the same or substantially the same area may be filed until one year after the election. Within sixty days after any election approving an incorporation the governing body of the county shall by ordinance declare that city incorporated, shall designate the metes and bounds, the class and

Honorable Donald J. Gralike

the name thereof and shall designate the officers of the city who shall hold office until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified. Thenceforth such city shall be a body politic and corporate, possessed of all the powers and subject to all laws pertaining to its class. Failure of the governing body of the county to act upon any petition for incorporation within ninety days after it has been filed shall be deemed a denial thereof."

You will recall that in our Opinion No. 74 issued to you March 17, 1966, we pointed out that Section 72.085 can be interpreted and harmonized with the language of Section 72.080.

The General Assembly has provided for the incorporation of any city or town situated on the county line and in two counties by Section 72.100, RSMo 1969, as follows:

"Provided, that when any city or town is or may be situated on the county line, and in two counties, the petition shall be signed by a majority of the taxable inhabitants of such city or town in each county, and presented to the county court of each county, and designating which of the two county courts shall designate the officers therefor, and if the county court of each county declares such city or town incorporated, the inhabitants thereof shall thenceforth be a body politic and incorporate, by the name and style of 'the city of, or 'the town of, and provided further, that appeals taken from the decision of the mayor, judge or other officer before whom any cause is tried, acting for said city or town, may be sent to the circuit court of either county wherein such city or town is situated, as may be specified in the order granting such appeal."

Your present question then is whether Section 72.085 which authorizes a method alternative to that prescribed in Section 72.080 for the incorporation of cities and towns located in one county also authorizes a method alternative to that prescribed in Section 72.100 for the incorporation of cities and towns located in more than one county.

Honorable Donald J. Gralike

It is to be observed that paragraph 1 of Section 72.085 specifies ". . . any unincorporated area of land in any second class county or first class county having a charter form of government. . . ." Ordinarily, the use of the word "or" in a statute is a disjunctive that marks an alternative generally corresponding to "either." *Dodd v. Independent Stove & Furnace Co.*, 51 S.W.2d 114. Therefore, the unincorporated area described in Section 72.085 must be located either in any second class county or in a first class county having a charter form of government. That is to say, it may be located in either one county or the other but cannot be located in both counties.

Additional support for this view is found in the other language of the statute. Paragraph 2 of Section 72.085 provides that incorporation proceedings may be instituted by the filing of a petition with "the governing body of such county." Paragraph 3 of the same section provides that "the governing body of the county" may approve or disapprove the petition and upon approval shall submit the proposal for incorporation to the qualified voters in the area proposed to be incorporated. It further provides that "the governing body of the county" shall set the date for such election and the election officials "in such county" shall submit the proposed incorporation at the election by ballot in the form required. Within sixty days after any election approving an incorporation "the governing body of the county" shall by ordinance declare the city incorporated. Failure of "the governing body of the county" to act upon any petition for incorporation within ninety days after it has been filed shall be deemed a denial thereof.

Looking to the context of the statute as a whole, we find no language or provision therein from which an implication necessarily arises that it was the legislative intent to permit the alternative procedure to be used when the area to be incorporated is located in two different counties. It is apparent, therefore, that Section 72.085 does not contemplate action by the governing body of more than one county or by each county as provided in Section 72.100.

CONCLUSION

It is, therefore, the opinion of this office that the alternative procedure authorized in Section 72.085, RSMo 1969, for incorporating cities in any second class county or first class county having a charter form of government, may not be used in place of the procedure prescribed in Section 72.100, RSMo 1969, for the incorporation of unincorporated areas situated on the county line and in two counties.

Honorable Donald J. Gralike

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 74
3-17-66, Gralike

MAGISTRATES:
POPULATION:

An additional magistrate created under the provisions of Section 482.010, RSMo 1969, does not become a regular

magistrate under said section when the county becomes entitled to another regular magistrate because of an increase in the number of the inhabitants of the county. When the county becomes entitled to a second magistrate because of a population increase indicated by the 1970 census, the governor has the authority to appoint a regular magistrate on or after July 1, 1971, who serves until the next general election. If such regular magistrate is not appointed, the temporary magistrate has authority to continue to act until a regular magistrate is chosen at the next general election and duly qualifies and takes office. The regular magistrate elected at the November 1972 general election holds office for an unexpired term ending December 31, 1974.

OPINION NO. 127
AMENDED
January 22, 1973

May 13, 1971

Honorable Arlie H. Meyer
State Representative
Forty-fourth District
Room 235, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Meyer:

This opinion is in response to your request for an opinion of this office with respect to the following situation:

"This Magistrate Court, District Number Two, was created in accordance with Article V, Section 18, of the Missouri Constitution and RS Mo. 482.010 and RS Mo 482.040 by the Circuit Court of St. Charles County, during 1970 and prior to the primary election. In the instant case, on petition of five hundred qualified voters, the circuit court, after publication of notice and hearing, found from the evidence that the administration of justice required an additional magistrate and that the need was not a temporary and that a permanent need existed. The Court was redistricted and

Honorable Arlie H. Meyer

I was elected magistrate on November 3, 1970, for the four year term beginning January 1, 1971. The United States Census, which was completed after my election, has determined that the population of St. Charles County now exceeds 92,000 persons.

"The Missouri Constitution and Section 482.010 RS Mo 1969 provides that there shall be two Magistrates in counties having more than 70,000 and less than 100,000 inhabitants. Section 1.100 RS Mo. 1969 would indicate that the 1970 census will become effective on July 1, 1971, for matters other than salaries and fees of county officers and that those particular matters became effective on January 1, 1971. Section 482.150 RS Mo 1969 provides that the State shall pay all Magistrates except those additional magistrates created by the circuit court and whose salaries shall be paid by the county; 483.490 provides similarly that the clerks and deputies of additional magistrates shall be paid by the county.

"In view of the foregoing, the State Comptroller's office and the County Court of St. Charles County have requested that I obtain an opinion of the Attorney General as to whether the increase in population of the county to over 70,000 changed the status of Magistrate of District Number 2, from an 'additional' Magistrate to a 'regular' one by reason of the census. The opinion should also advise if the State will become liable for payment of the salaries of the Magistrate, his clerk and deputy and, if so, the date when the State's liability for the salaries begins."

As noted in the question, the additional magistrate was elected under the provisions of Section 482.010, RSMo 1969, after being authorized by a proper order of the circuit court. We understand that the order when initially entered was certified to the governor but that no interim appointment was made by the governor as provided in that section. In the absence of such appointment, we believe that it was proper to elect the magistrate at the next general election for the full term.

Honorable Arlie H. Meyer

It is also correct as has been noted above, that Section 482.150, RSMo 1969, requires that the salaries of additional magistrates whose offices are created by order of the circuit court as provided for in Article V, Section 18 of the Missouri Constitution (Section 482.010) shall be paid by the county. It is also correct that Section 483.490, RSMo 1969, provides that the "salaries of clerks, deputy clerks and employees of additional magistrates whose offices are created by order of the circuit court as provided in Section 482.010, RSMo, shall be paid by the county as the salaries of such magistrates are required to be paid."

As noted above, Section 482.010, provides that in "counties of more than 70,000 and less than 100,000 inhabitants, there shall be two magistrates."

Section 1.100, RSMo 1969, provides that:

"1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961.

"2. Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation shall be deemed to include all

Honorable Arlie H. Meyer

counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed."

We turn first to a consideration of whether the additional magistrate authorized by order of the circuit court automatically becomes the second magistrate required by Section 482.010, RSMo 1969, for such a county. We hold that he does not.

Section 482.010, RSMo 1969, above referred to provides for two types of magistrate judges. First, this section requires what might be termed "a regular magistrate", that is, an office which a county must have because of its population. Second, it provides for "additional magistrates", which may be authorized in addition to the number of "regular magistrates" if the circuit court of the county involved finds that the administration of justice requires such additional magistrate. The difference in the classification is obvious from Section 482.150, RSMo 1969, which provides that regular magistrates shall be paid by the state and also provides that additional magistrates shall be paid by the county. The difference is further exemplified by Section 483.490, RSMo 1969, which provides that the salaries of clerks and deputy clerks and employees shall be paid by the state as provided except for such employees of additional magistrates whose offices are created by order of the circuit court.

The office of regular magistrate which is required by reason of the change in the population of the county is separate and distinct from the office of additional magistrate created by the circuit court according to the needs of justice. In our view, the additional magistrate created by the order of the circuit court does not, therefore, become the new magistrate and does not occupy the position created by the change of population.

The question is then whether the county will have three magistrate judges at the time of the creation of the new position.

The number of magistrates in each county is fixed in our Constitution, Section 18, Article V. Section 482.010, RSMo 1969, merely copies the constitutional provision. Both the Constitution and the statute authorize the circuit court upon petition and after hearing to increase the "foregoing number" of magistrates in any county "according to the needs of justice, and similarly to decrease "such increased number". The "foregoing number" obviously refers to the number fixed by the Constitution and statute, namely one magistrate in counties in the thirty to seventy thousand classification and two magistrates in the seventy to one hundred thousand classification.

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The order of the circuit court which created the additional magistrate for that county stated that the number of magistrates was to be increased by one. This could, of course, mean only that the number of magistrates then required in the interests of justice was two. Now that the situation is changed so that by reason of the increase in population "the foregoing number" is two, the circuit court order authorizing an increase in the number of magistrates from one to two can not be construed to be a finding that the number should be increased from two to three. Bearing in mind that the circuit court made the finding "according to the needs of justice" it is our opinion that when the county becomes entitled to two "regular magistrates" the circuit court order is functus officio and no longer of any force or effect. That is, it is settled law that when an office has fulfilled its function and an order has accomplished its purpose it becomes functus officio. 37 C.J.S. Functus Officio, p. 1401. State v. Atterbury, 300 S.W.2d 806 (Mo. en banc 1957), Siemers v. St. Louis Electrical Terminal Ry. Co., 155 S.W.2d 130 (Mo. 1941). Hence effective with the incumbency of the new regular magistrate there will no longer be any additional magistrate unless and until the circuit court makes a new finding, after a hearing, that the needs of justice require that the number of magistrates be increased from two to three.

This then brings us to a consideration of when the regular magistrate's office is created and at what point in time the additional magistrate position ceases to exist.

In this case we note that the term of the additional magistrate will not have expired as of July 1, 1971, which in our view is, under Section 1.100, RSMo 1969, the effective date for the appointment of the second magistrate required by Section 482.010 when a county has more than 70,000 and less than 100,000 population.

Article VII, Section 12 of the Missouri Constitution provides:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

However, with respect to this constitutional provision, the Missouri Supreme Court held in State ex rel. Voss v. Davis, 418 S.W.2d 163 (Mo. 1967) at l.c. 168, that there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at its incumbent.

Honorable Arlie H. Meyer

We note also with respect to the term of the magistrate that there is no constitutional provision specifically prohibiting the legislature from removing the incumbent magistrate by abolishing the office as is the case with respect to circuit judges under Section 15 of Article V of the Missouri Constitution. As a result it is our view that at a certain point which we will hereafter indicate, the additional magistrate office created by the circuit court decree is abolished by operation of law and even though he was in fact in this case elected for a specific term, his office will be abolished before the end of his term without violating the Constitution.

We further note that our Missouri Supreme Court en banc in the case of State v. Kiburz, 208 S.W.2d 285 (1947) held at l.c. 290 that:

" . . . In State ex rel Brown v. McMillan, 108 Mo. 153, 159, 18 S.W. 784, 785, it was said: 'We think that both authority and the spirit of our institutions favor the view that when an office is created, and no restrictions for filling the vacancy are imposed, a vacancy arises ipso facto.' . . ."

Turning next to Section 482.020, we note that paragraph 2 of such section states:

"When a vacancy occurs in the office of the magistrate, the governor may supply the same by the appointment of some person competent and qualified, who shall hold his office until the next general election at which a successor shall be elected for the unexpired or the full term as the case may be."

It follows that the governor is authorized and empowered by this statute to appoint some qualified person to the vacancy which arises in the second regular magistrate position. Whether or not the governor makes such an appointment the position will be filled at the next general election.

However, it is also our view that if the second regular magistrate vacancy is not filled by the governor, the needs of the administration of justice as found by the order of the circuit court to require two magistrates for the county have not been met and the order of the circuit court creating the additional magistrate office does not become functus officio until a regular magistrate is elected at the next general election. In other words,

Honorable Arlie H. Meyer

it is our view that the additional magistrate office continues to exist until an appointment is made to fill the second regular magistrate position or, until a regular magistrate elected at the November 1972 general election takes office. Once such an appointment is made or an elected second regular magistrate takes office the office of additional magistrate is abolished and the last incumbent is without authority to act as additional magistrate, regular magistrate or as a substitute for either of the two regular magistrates.

We are further of the view that as long as the additional magistrate remains in office he does so by virtue of the order of the circuit court and because of the needs of justice and it follows that in such case the additional magistrate and his clerks continue to receive their compensation from the county as provided above.

Finally, this opinion has been modified and amended to correct a misstatement in the former conclusion (without modification of statutory quotations herein as such changes made since the issuance of the opinion are not significant) to express our view that the term of a regular magistrate elected at the 1972 election will expire in accordance with the provisions of Section 482.010. That is, magistrates are elected every four years beginning in 1946 for terms beginning the following January 1 under the provisions of Sections 482.010 and 482.050. The vacancy filled by election in the regular magistrate position is therefore for the unexpired portion of such term which expires December 31, 1974, and the successor in office is to be chosen at the general election in 1974.

CONCLUSION

It is the opinion of this office that an additional magistrate created under the provisions of Section 482.010, RSMo 1969, does not become a regular magistrate under said section when the county becomes entitled to another regular magistrate because of an increase in the number of the inhabitants of the county. When the county becomes entitled to a second magistrate because of a population increase indicated by the 1970 census, the governor has the authority to appoint a regular magistrate on or after July 1, 1971, who serves until the next general election. If such regular magistrate is not appointed, the temporary magistrate has authority to continue to act until a regular magistrate is chosen at the next general election and duly qualifies and takes office. The regular magistrate elected at the November 1972 general election holds office for an unexpired term ending December 31, 1974.

Honorable Arlie H. Meyer

The foregoing opinion, which I hereby approved, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

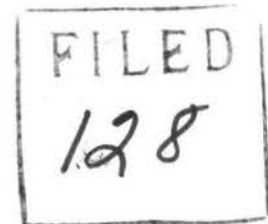
FIRE PROTECTION DISTRICTS:

1. A fire protection district may provide emergency assistance and first aid even though emergency ambulance service is not established under Section 321.225 RSMo 1969. 2. The board of directors of a fire protection district organized prior to October 13, 1969, under Section 321.510 to 321.715 RSMo 1959 as amended, continue in office until the expiration of their terms and no successors shall be elected for the two members whose terms first expire. 3. The board of directors should certify the tax levy as provided under Section 321.250 RSMo 1969 to the county court of each county in which the fire protection district is located and the taxes should be collected by the officials whose duty it is to collect taxes for such counties.

May 6, 1971

OPINION NO. 128

Honorable James G. Lauderdale
Prosecuting Attorney
Lafayette County
1017 Franklin Avenue
Lexington, Missouri 64067



Dear Mr. Lauderdale:

This is in response to your request for an opinion as follows:

"On January 20, 1971, I talked at some length by telephone to Harvey Tettlebaum in your office re House Bill No. 322, as passed by the 75th General Assembly. I explained to him that on July 4, 1969, the Concordia Fire Protection District, Inc., was organized under the provisions of the 'old law,' that said District includes parts of Lafayette, Saline and Johnson Counties.

"In your Opinion No. 438, you concluded that Fire Protection Districts organized under the provision of said 'old law', Sec. 321.510 to Sec. 321.715, RSMO., 1969, continue as legal entities, although the Statutes, under which they were organized, have been repealed, and that emergency service provided for under Sec. 321.225, RSMO., 1969, furnished by the District, must be furnished for the entire District.

Honorable James G. Lauderdale

"Question; now it seems we have an 'orphan' group with no parent, trying to continue to live in 'limbo' with little legal direction to help decide what it can or can't do. 1) Can the Fire Protection District, under its original organization and authority, now by a vote of the Board of Directors increase its operating levy to the maximum of twenty five cents and use the money as is now provided by Sec. 321.010, RSMo., as set out in House Bill No. 322, to 'render first aid for the purpose of saving lives, and give assistance in the event of an accident or emergency of any kind.' 2) Does the Fire Protection District continue to operate within the board of five members, or must they now operate with a three member board as provided by the new law. 3) Assuming that they may vote to increase their levy, what procedures do they follow for certifying this levy to the County Courts of the three respective Counties, as abovesaid, and what authority is there for the County Court to accept, assess and collect the additional tax."

You refer to Opinion No. 438 issued by this office on October 28, 1970 in which we stated that fire protection districts organized on or before October 13, 1969 continue as legal entities. The authority for that statement is found in House Bill 322 enacted in 1969 which states as follows:

"Section A. Any fire district already formed or in the process of being formed under the laws of this state on October 13, 1969 shall on the completion of its formation automatically be under all the provisions of chapter 321, RSMo."

You state the fire protection district in question was organized in July, 1969. It is now governed by the new provisions to which we refer.

Section 321.240 RSMo 1969 authorizes a board of directors of the fire protection district to levy a tax not in excess of 30 cents on the one hundred dollars valuation of taxable, tangible property within the district. The funds can be used for paying expenses of organization and operation and costs of acquiring, supplying and maintaining the property, works and equipment of the district and maintaining the necessary personnel.

In answer to your first question in which you inquire whether these funds may be used for the purpose of providing assistance in

Honorable James G. Lauderdale

accidents or emergencies we note that Section 321.010 RSMo 1969 provides in part:

"1. A 'fire protection district' is a political subdivision which is organized and empowered to supply protection by any available means to persons and property against injuries and damage from fire and from hazards which do or may cause fire, and which is also empowered to render first aid for the purpose of saving lives, and to give assistance in the event of an accident or emergency of any kind. The district must consist of contiguous tracts or parcels of property, and may include within its boundaries, or may be contiguous with, any city, town or village."

Further Section 321.220 RSMo 1969 provides that the district shall have power:

"(14) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this chapter;"

It is our view therefore that the broad powers conferred on the board in Section 321.010 are to be liberally construed and as a result even though an ambulance service is not authorized under Section 321.225 RSMo 1969, the board has the power to provide first aid and emergency equipment services as part of the district's general operations. That is, although in such a case ambulance services are not authorized and therefore cannot be provided, other emergency services are authorized and may be paid for out of the thirty cent levy authorized by Section 321.240.

In answer to your second question, it is our opinion that the present board of directors consisting of five members continue in office until the expiration of their terms, but no successors shall be elected for the two directors whose terms first expire.

In reply to your third question we refer to Section 321.250 RSMo 1969 which provides:

"On or before the fifteenth day of May of each year, the board shall certify to the county court of the county within which the district is located a rate of levy so fixed by the board

Honorable James G. Lauderdale

as provided by law, with directions that at the time and in the manner required by law for levy of taxes for county purposes such county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable tangible property within the district, in addition to such other taxes as may be levied by such county court."

Further, Section 1.030 RSMo 1969 provides:

"1. Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person is included, although distributive words are not used.

"2. When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, are included."

Although Section 321.250, refers to "county" in the singular, it is clear from the language used in Section "A" of House Bill 322, that under Section 1.030 the word "county" in Section 321.250 would include all counties in which parts of the fire protection district are located, and that, therefore, the fire protection district should certify to the county courts of the counties in which the district is located, the tax levy for such fire protection district. Under Section 321.270 RSMo 1969 it is the duty of the officials charged with the duty of collecting taxes in the respective counties to collect such taxes.

CONCLUSION

It is the opinion of this office that:

1. A fire protection district may provide emergency assistance and first aid even though emergency ambulance service is not established under Section 321.225 RSMo 1969.

2. The board of directors of a fire protection district organized prior to October 13, 1969, under Section 321.510 to 321.715 RSMo 1959 as amended continue in office until the expiration of their terms and no successors shall be elected for the two members whose terms first expire.

Honorable James G. Lauderdale

3. The board of directors should certify the tax levy as provided under Section 321.250 RSMo 1969 to the county court of each county in which the fire protection district is located and the taxes should be collected by the officials whose duty it is to collect taxes for such counties.

The foregoing opinion which I hereby approve was prepared by my assistant John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

January 29, 1971

OPINION LETTER 129
Answered by Klaffenbach

Honorable George P. Dames
State Representative
104th Legislative District
O'Fallon, Missouri 63366



Dear Mr. Dames:

This letter is in response to your opinion request in which you ask the following question:

"Can a fourth class City in a second class County provide by ordinance for the appointment of the Municipal Judge by the Mayor with the approval of the majority of the Aldermen?"

We are enclosing for your information in this respect our Opinion No. 376, dated September 18, 1969 to Branom.

Sections 98.500 RSMo. 1969 et seq contain provisions relating to municipal and police judges in fourth class cities located in counties of the first class with a charter form of government and all other fourth class cities. We find no special provisions relating to fourth class cities in counties of the second class. It is therefore our view that Section 98.510 RSMo. 1969 provides that the Mayor shall be police judge and that Section 98.500 authorizes the Mayor and the Board of Aldermen of cities of the fourth class not in a county of the first class with a charter form of government to by ordinance provide for the election of a police judge but it is noteworthy that the provision with respect to such fourth class cities not within a county of the first class with a charter form of government does not authorize the appointment of such a police judge.

We are therefore of the view that a city of the fourth class in a second class county has no authority to provide for the appointment of a police judge.

Very truly yours,

JOHN C. DANFORTH
Attorney General

April 6, 1971

Answer by letter-Wood

OPINION LETTER NO. 130

Honorable Vernon Bruckerhoff
Representative, District 154
Room 203A, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bruckerhoff:

You have requested my opinion on who has the legal right to claim and maintain "Tower Rock," a small island of approximately one-half acre in the Mississippi River near Wittenberg, Perry County, Missouri.

Tower Rock is situated in Township 34 North, Range 14 East, Perry County, which was originally surveyed by the government during the years 1817 through 1819. The plat of this original survey designates "Grand Tower" as lying just off-shore from the section line dividing Sections 20 and 29, Township 34 North, Range 14 East. Therefore, we conclude that "Tower Rock" or "Grand Tower," one and the same, existed prior to Missouri's statehood as an island in the Mississippi River and necessarily below the low water mark of the river.

We understand the general rule of law to be that title to the beds of navigable streams and islands below the low water mark of such streams passed from the United States to the State of Missouri upon its admission into the Union (Conran v. Girvin, 341 S.W.2d 75, 80 (Mo. banc 1960); Hecker v. Bleish, 3 S.W.2d 1008, 1016 (Mo. 1927)). An exception to this rule is where the United States has prior to statehood surveyed or patented the island as government land (Stoner v. Royar, 98 S.W. 601, 603 (Mo. 1906)).

The recorder of Perry County advises us that, to the best of his knowledge, there is no record of a government land patent or survey of "Tower Rock" in his office.

Honorable Vernon Bruckerhoff

Accordingly, we are of the opinion that "Tower Rock" is subject to the general rule and not the exception.

". . . The only other question is whether the United States has title to the islands, . . . notwithstanding the incorporation of Michigan as a state. The bill admits and alleges that the bed of the river, or strait, surrounding the islands, passed to Michigan when Michigan became a state . . . subject to the same public trusts and limitations as lands under tide waters on the borders of the sea . . . But it sets up that the islands remained the property of the United States, and it argues that, in such circumstances, the islands did not pass by the patent of the neighboring land.

"The act offering Michigan admission to the Union provided that no right was conferred upon the state 'to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said state.' . . . And again, by a condition, that the state should 'never interfere with the primary disposal of the soil within the same by the United States.' . . . The islands are little more than rocks, rising very slightly above the level of the water, and contain respectively a small fraction of an acre and a little more than an acre. They were unsurveyed and of no apparent value. We cannot think that these provisions excepted such islands from the admitted transfer to the state of the bed of the streams surrounding them.

. . .

"The bed of the river could not be conveyed by the patent of the United States alone, but, if such is the law of the state, the bed will pass to the patentee by the help of that law, . . ." (United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 451-452, 52 L.Ed. 881, 887 (1908))

Section 5 of Missouri's Act of Admission (Volume 5, RSMo 1969, p. 4174) has similar provisions as that of Michigan's, but unlike the law of Michigan, the law in Missouri is that riparian ownership of lands on a navigable stream carries title only to the low

Honorable Vernon Bruckerhoff

water mark, not to the center thread of the stream (Conran v. Grivin, supra). Therefore, it is our opinion that "Tower Rock" belonged to the State of Missouri and was not subject to government patents of the neighboring uplands.

We are aware that President Ulysses S. Grant may have issued an executive order in 1871 purporting to "withdraw" Grand Tower Rock for "public purposes," or even for a "national preserve" or a "national park" (The Missouri Historical Review, Vol. 27, No. 3 (April 1933); pp. 262-264). Although we doubt that such an order was intended to do any more than prevent the destruction of the island by federal agencies, we think it was without efficacy to confer ownership of the island upon the federal government.

" . . . The government also refers to proceedings since Utah became a state, with respect to governmental investigations, operations under placer claims, and withdrawals for power and reservoir sites. It is not necessary to review these transactions in detail, as nothing that has been done alters the essential facts with respect to the navigability of the streams, and the United States could not, without the consent of Utah, divest that state of title to the beds of the rivers which the state had acquired. Nor has Utah taken any action which could be deemed to estop the state from asserting title." (United States v. Utah, 283 U.S. 64, 88-89, 75 L.Ed. 844, 856 (1931))

In 1895, the legislature of Missouri enacted the following law, now appearing as Section 241.290, RSMo.

"All lands belonging to the state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment of their waters of the old beds of lakes and rivers in this state, or by the formation of islands in the navigable waters of the state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

By virtue of this law, we believe the title to "Tower Rock" passed to Perry County, to be thereafter held or disposed of as provided by these statutes (Sections 241.290-241.340, RSMo).

Yours very truly,

JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
REFERENDUM:
TAXATION (INCOME):

1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly, if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum. 2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

OPINION NO. 131

April 15, 1971

Honorable Don Owens
State Senator
Room 432, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Owens:

This is in response to your request for an opinion from this office on whether the legislature has the right to prevent a referendum on any tax proposal as outlined in the recent tax measure. The tax measure to which you refer is House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly which repealed Sections 143.010 and 143.030, RSMo, relating to the income tax law, and enacting two new sections relating to the same subject with an emergency clause.

The question submitted is whether House Bill No. 3 is subject to a referendum under Article III, Section 52(a) of the Constitution of Missouri.

House Bill No. 3 repeals Sections 143.010 and 143.030, RSMo, which provided for the collection of an income tax on individuals and corporations and enacted two new sections providing for the collection of an income tax from individuals and corporations. It provides for a graduated income tax according to the net income. It provides an emergency clause as follows:

"Because there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of state government, this act is

Honorable Don Owens

necessary for the immediate preservation of the public peace, health and safety, and an emergency exists within the meaning of the constitution. This act shall become effective January 1, 1971, or upon final passage and approval, whichever occurs latest."

Article III, Section 52(a) of the Constitution of Missouri provides:

"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded."

Article III, Section 29 of the Constitution of Missouri provides:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Honorable Don Owens

All laws passed by the legislature are subject to referendum under Article III, Section 52(a) unless they come within one of the exceptions as provided therein. The above constitutional provisions must be considered together in determining whether the statute comes within one of the exceptions. Before an act comes within exception the legislature must declare, and set forth in the preamble or body of the act, the fact or facts that bring it within the exception. The mere declaration by the legislature that an act is an emergency measure cannot make it so, but it is for a court in a traditional procedure to determine whether the act in fact is an emergency measure within the means of these constitutional provisions. State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S.W. 641 (1921). State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 S.W. 327 (1920). State ex rel. Tyler v. Davis, 443 S.W.2d 625 (1969).

In discussing jurisdiction the court in these matters in Westhues v. Sullivan, supra, the court stated, l.c. 589-599:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum, by a mere declaration of 'immediate preservation of the peace, health or safety,' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yard stick of the Constitution, and determine whether or not the law-makers breached the Constitution in making the declaration. In the recent case of Attorney General v. Lindsay, 178 Mich. 1. c. 531, the court said:

"'Courts have never refused to review acts of the Legislature in the exercise of a discretion, unless it explicitly appears that the grant of such discretion was exclusive, and the right to determine, in such a case, the question as to whether the exercise of such discretion by the Legislature has been a proper one is inherent in the court as the final arbiter of consti-

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tutional and statutory construction. This case is no other or different from any other case which involves constitutional construction, and it must be decided upon well-known principles of law and the application of the ordinary rules of such construction.'"

No one can seriously contend that the act under consideration is an appropriation act and exempt from referendum for that reason. The act repeals two statutes which provided for the rate of income tax to be paid by individuals and corporations, and enacted two new sections which increased the income tax rate to be paid by individuals and corporations. Taxes collected by virtue of these statutes are not levied or collected for any particular purpose or agency of the state but become general revenue. The act does not appropriate any money for any particular purpose or agency of the state. Therefore, it is not exempt from referendum as an appropriation act under Article III, Section 52(a), supra. State ex rel. Harvey v. Linville, et al., 318 Mo. 698, 300 S.W. 1066 (1927).

The question is whether the act is exempt from referendum under the above constitutional provision as a "law necessary for the immediate preservation of the public peace, health and safety."

The legislature declared in the emergency provision that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government, and that the act is necessary for the immediate preservation of the public peace, health and safety. As heretofore stated, whether the legislature has declared in the act itself facts, which if true, constitute an emergency, and whether such facts as stated are true is a matter for the courts to decide. The declaration made by the legislature in the Act is not conclusive. State ex rel. Westhues v. Sullivan, supra.

In Board of Regents v. Palmer, 204 S.W.2d 291, the Supreme Court of Missouri said l.c. 295:

" . . . Section 10 of the act expresses the emergency thus: 'Because of the great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, there is an immediate need for the authority granted by this Act, and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency

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exists within the meaning of the Constitution of the State of Missouri. . . ."

In deciding this was a sufficient statement of facts which, if true, would constitute an emergency, the court stated l.c. 295:

". . . Certainly it cannot be said that this declaration is such a mere conclusion as to invalidate the act as an improper expression of an emergency. . . ."

We believe the declaration made by the legislature in the Act under consideration that there is a serious and immediate need for additional funds to adequately finance the necessary functions and programs of the state government is a sufficient declaration of fact, which if true, would create an immediate emergency within the meaning of the above constitutional provision.

Whether the declaration made by the legislature in the Act under consideration is true and correct cannot be determined from the face of the Act itself but must be determined by evidence and other information submitted in support thereof. All that this office is authorized to do under the present circumstances is to express our opinion, which, we have done, on whether the emergency declaration in the Act states facts, and which facts, if true, would be an emergency within the meaning of that term as used in Article III, Section 52(a) of the Constitution.

CONCLUSION

It is the opinion of this office that:

1. The facts stated in the emergency clause of House Bill No. 3 of the Fourth Extraordinary Session of the Seventy-fifth General Assembly if true, would be an emergency within the meaning of that term under Article III, Section 52(a) of the Constitution of Missouri which would exempt such bill from being subject to a referendum.

2. Whether the facts stated are true is a matter of fact which must be determined by evidence submitted in support thereof in a proper court procedure.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

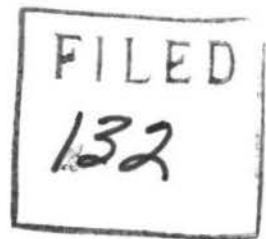
Very truly yours,



JOHN C. DANFORTH
Attorney General

June 3, 1971

OPINION LETTER NO. 132
Answer by Letter (Tettlebaum)



Honorable Howard E. Hines
State Representative
Twenty-first District
Room 412, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Hines:

This is in response to your request for an official opinion as follows:

"Please furnish an opinion on the points as follows relative to annexation of the unincorporated land areas into the incorporated limits of the constitutional charter city in Jackson County, Missouri.

"1. What limit of time may such a city, legally hold incorporated areas under a valid holding ordinance?

"2. May such holding ordinance be amended and renewed at numerous times to extend the holding ordinance time?

"3. What effect would the placing of an overlapping holding ordinance, by a second city make upon an already existing valid holding ordinance held by another city?"

The applicable section of the Charter of the City of Independence, Missouri reads as follows:

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"Section 1.4. Powers of the city: Certain powers specified. Without limitation of the powers conferred upon the city by section 1.3 of this article or by any other provision of this charter, the city shall have power:

* * *

"(37) To extend or diminish the limits of the city by ordinance passed by the council and approved by a vote of a majority of the registered qualified electors voting on the question at an election; provided that approval by the registered qualified electors shall not be required for a holding ordinance; . . ."

We understand the term "holding ordinance" to mean an ordinance passed by the legislative body of a constitutional charter city setting a date for submission to the voters of an amendment to its charter extending its borders. The applicable procedure is set out in Article 6, Section 20, Missouri Constitution 1945, which provides:

"Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten per cent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance, that any amendment so proposed shall be submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter."

In the case of State ex rel. Kansas City v. North Kansas City, 228 S.W.2d 762, 360 Mo. 374 (1950), the court said:

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"The powers which relator could exercise, through the constitutional grant of the right to adopt and amend its charter were such 'powers which the people of the city delegate to it under its charter, if unrestrained by constitutional limitation.' *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498, 499, 501. And by Sec. 5 of Article I of its charter the people of relator city delegated to relator the power to 'extend its limits by amendment of this charter in the manner provided by the Constitution', etc.

"Whatever may be the rule in any other jurisdiction, or however any court in some other jurisdiction may have construed some other constitution, we hold that under the Constitution of Missouri relator has a constitutional grant of power and authority to extend its city limits by amendment of its charter in compliance with Sec. 20 of Article VI of the Missouri Constitution of 1945. Specific legislative authority to extend relator's limits is unnecessary. It was legally sufficient for adoption that a majority of the qualified electors voting thereon approved relator's proposal to amend its charter to extend its boundaries. The approval by a majority met constitutional requirements." Id. at 771.

Therefore, it is clear that the people of Independence by approving Section 1.4 (37) delegated to the City of Independence the right to institute the practice above described.

Generally, the procedures followed by the city attempting to annex territory contiguous thereto are presumed reasonable and valid until challenged. State ex rel. Kansas City v. North Kansas City, loc. cit. at 774. The reasonableness and validity of specific annexation procedures may be challenged by a municipality seeking to annex the same or portions of the same territory in question. It has long been held in Missouri that the municipality obtaining "prior jurisdiction" in proceedings to annex territory has exclusive jurisdiction until such annexation is decided. State ex inf. Goodman, ex rel. Crewdson v. Smith, 331 Mo. 211, 53 S.W.2d 271, 272. It is for the courts to decide whether the act of a city in continually extending the date of the election to amend its charter constitutes a valid claim under the doctrine of "prior jurisdiction" to the territory to be annexed. In the

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case of Emerson Electric Manufacturing v. City of Ferguson, 376 S.W.2d 643 (St.L.Ct.App. 1964), in considering the doctrine of "prior jurisdiction" the court said:

"Under this doctrine where two public bodies each claim jurisdiction over the same territory by virtue of annexation proceedings, the public body which takes the first valid step to accomplish annexation has the superior claim regardless of which one completes its proceedings first. State ex rel Industrial Properties Inc. v. Weinstein Mo.App. 306 S.W.2d 634. . . ." Id at 646.

In addition, it has been held by Missouri courts that the mere introduction of an ordinance pursuant to the initiation of an annexation proceeding gave the city introducing said ordinance "prior jurisdiction" over a neighboring municipality. City of Joplin v. Village of Shoal Creek Drive, 434 S.W.2d 25, 29 -30 (Spr. Ct.App. 1968).

It is therefore, the view of this office that in connection with an annexation by a city of territory contiguous thereto, the validity and reasonableness of both the annexation and steps taken to effect said annexation as well as the question of the priority of jurisdiction over the territory to be annexed are questions to be decided by the court in each individual case.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
CONSTITUTIONAL LAW:

1. The parent, guardian or other person having charge, control or custody of a child under the age of seven or over sixteen does not come within the provisions of Section 167.031, RSMo 1969, relating to compulsory school attendance on a full-time basis. However, a person standing in the parental relation to a child between sixteen and eighteen years of age who has not completed the elementary school course in the public schools of Missouri, or its equivalent, does come within the provisions of Section 167.051(2), RSMo 1969, relating to compulsory attendance at a part-time school. 2. All children in the State of Missouri between the ages of six and twenty years have a constitutional right to a public school education. All children who are entitled to a public school education as a matter of right but who do not fall within the age group of the Compulsory School Attendance Law may attend a public school on a part-time basis subject to a school district's reasonable rules and regulations. 3. Subject to reasonable rules and regulations applicable to all students, public school authorities operating an area vocational school must enroll a private school student who desires to participate in the vocational instruction offered at the school outside of the regular school day if the student is within the age group of children entitled to a public education as a matter of right. Shared time instruction in area vocational schools whereby students between the ages of sixteen and twenty attend the public vocational school for part of the regular school day and take the remainder of their courses at a church related school does not violate either the statutes or Constitution of Missouri or the United States Constitution.

OPINION NO. 133

October 28, 1971

Honorable Norbert J. Jasper
Representative, District 108
819 West Second Street
Washington, Missouri 63090



Dear Representative Jasper:

This official opinion is issued in response to your request for a ruling on the following questions:

"I request your official opinion on the law applicable to the following situation: There is an area of vocational school in my district operated by the public school Board of Education. Administrators of the public school district and local nonpublic schools would like to work out an arrangement whereby

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pupils enrolled in the local nonpublic schools could attend vocational education courses in the area vocational school operated by the public school district. Most of the children involved in this program would be sixteen, seventeen or eighteen years of age.

"I would appreciate your ruling on the following questions:

1. Is a child who has not reached his seventh birthday or has reached his sixteenth birthday required to comply with the Compulsory Attendance Law, Section 167.031 RSMo., 1969? Also, is a child seventeen, eighteen or older required to comply?
2. Does a child not covered by the Compulsory Attendance Law have a right to attend the public schools? May such children exercise their right by part-time attendance?
3. If a child is not within the ages covered by the Compulsory Attendance Law, may he attend the public school part-time and attend some school other than a public school for the remainder of the regular school time?
4. Does a public school Board of Education have authority to enroll a pupil on a part-time basis if he is not within the ages covered by the Compulsory Attendance Law? Assuming that such a pupil meets other reasonable requirements, academic, health, discipline, etc., does the public school Board of Education have any authority to deny that pupil part-time enrollment even though he may spend part of his school time in some school other than a public school?"

QUESTION NO. 1

The Missouri Compulsory School Attendance Law, Section 167.031, RSMo 1969, provides as follows:

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"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish, not less than the entire school term of the school which the child attends or shall provide the child at home with regular daily instructions during the usual school hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day schools in the locality in which the child resides; except that

(1) A child who, to the satisfaction of the superintendent of schools of the district in which he resides, or if there is no superintendent then the chief school officer, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof; or

(2) A child between fourteen and sixteen years of age may be excused from attendance at school for the full time required, or any part thereof, by the superintendent of schools of the district, or if there is none then by the county superintendent of the county in which the child resides, or by a court of competent jurisdiction, when legal employment has been obtained by the child and found to be desirable, and after the parents or guardian of the child have been advised of the pending action."

Your first question implies that the Compulsory School Attendance Law applies directly to the child within the specified age group. It should be noted, therefore, that Section 167.031 applies to "every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years. . . ." Thus, a person standing in the parental relationship to a child becomes subject to Section 167.031 when the child reaches the age of seven years. The parent remains subject to Section 167.031 up to, but not including, the day the child celebrates the sixteenth anniversary of his birth. The child's sixteenth birthday is not counted for the purpose of determining the period of time the parent is subject to Section 167.031 because

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on the day of his sixteenth birthday the child is no longer "between" the ages of seven and sixteen years. In other words, a child is "between the ages of seven and sixteen years" from the date of his seventh birthday through the day preceding his sixteenth birthday.

Although the person standing in the parental relationship to a child who has reached the age of sixteen is no longer subject to Section 167.031, he may, nevertheless, be required to send his child to part-time school under subsection 2 of Section 167.051, RSMo 1969, which provides as follows:

"2. All children who are under eighteen years of age, who have not completed the elementary school course in the public schools of Missouri, or its equivalent, and who are not attending regularly any day school shall be required to attend regularly the part-time classes not less than four hours a week between the hours of eight o'clock in the morning and five o'clock in the afternoon during the entire year of the part-time classes."

This subsection requires the person standing in the parental relationship to a child under the age of eighteen, who has not completed the elementary school course, to send such child to the part-time classes referred to in subsection 1 of Section 167.051, if any are established. The elementary school course referred to is through eighth grade. Section 160.011(4), RSMo 1969. Thus, although the person standing in the parental relationship to a child who has reached the age of sixteen is no longer required to cause his child to regularly attend school on a full-time basis under Section 167.031, the parent of a child between sixteen and eighteen years of age who has not completed the eighth grade must cause such child to regularly attend a part-time school, if one is provided, under Section 167.051(2).

QUESTION NO. 2

Article IX, Section 1(a), Missouri Constitution, requires the legislature to establish and maintain a free public school system for all persons in the state not in excess of twenty-one years of age, but leaves it to the legislature to prescribe a more limited age group which shall be entitled to a free education. Article IX, Section 1(a) reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the

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general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ."

The duty to establish and maintain a free public school system is mandatory. Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, 488 (1883).

Pursuant to this constitutional mandate, the legislature has provided in Section 160.051, RSMo 1969, for the establishment of free public schools for persons between six and twenty years of age. Section 160.051 reads as follows:

"A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. Any child whose sixth birthday occurs before the first day of October after the first day of a school term shall be deemed to have attained the age of six years at the commencement of the term for the purpose of apportioning state school funds and for all other purposes. Gratuitous instruction for persons between the ages of five and six years may be provided by the board of education."

Referring to the predecessor of Section 1(a), the Supreme Court of Missouri in Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891) stated:

". . . The common-school system of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state, and a right belonging to citizens of this state as such. . . ." (Emphasis ours) 15 S.W. at 766

In State ex rel. Roberts v. Wilson, 221 Mo.App. 9, 297 S.W. 419 (Spr.Ct.App. 1927), the court noted:

". . . The right of children, of and within the prescribed school age, to attend the public school established in their district for

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them is not a privilege dependent upon the discretion of any one, but is a fundamental right, which cannot be denied, except for the general welfare. . . ." (Emphasis ours) 297 S.W. at 420

Thus, children between the ages of six and twenty have a constitutional right to a free public education. This right is not dependent upon the child being within the age group of the Compulsory School Attendance Law, Section 167.031, et seq., RSMo 1969. A child between six and twenty derives his right to a public education from the Missouri Constitution. The Compulsory School Attendance Law merely enforces that right. The title of Missouri's first Compulsory School Attendance Law supports this conclusion:

"An Act to enforce the constitutional right of every child in the state to an education, to provide for truant or parental schools and attendance officers in cities of ten thousand population or more and to prohibit the employment of children during school hours." Laws 1905, page 146

May a child who is entitled as a matter of right to a free public school education, but who is not covered by the Compulsory School Attendance Law, attend a public school on a part-time basis? You have not explained what you mean by "part-time attendance." We can envision this phrase as encompassing several different situations. For instance, a child might desire to attend a public school for only part of the regularly scheduled school year, or he might desire to attend a limited number of classes in a public school for either part of or the entire school year.

As stated above, Section 1(a), Article IX, imposes the duty on the legislature to establish and maintain a free public school system. By Section 160.051 the legislature has provided that all persons in the state between the ages of six and twenty are entitled to receive free public education. To carry out the constitutional mandate, the legislature established a public school system comprised of a number of separate school districts, and except as limited by statute, placed the general administration of public schools in the hands of the school boards of these school districts. School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d 909, 910 (Mo. 1937). This authority is expressed in Section 171.011, RSMo 1969, as follows:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. . . ."

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There are no statutory provisions, other than the Compulsory School Attendance Law, respecting the regularity of attendance at public schools by pupils between the ages of six and twenty years. Thus, we believe that the regularity of attendance by pupils who do not come within the provisions of the Compulsory School Attendance Law, but who are entitled to receive a free public school education as a matter of right is a subject relating to the government of the individual school district.

In discussing the power of a school board to make reasonable regulations for the government of its district, the Supreme Court of Missouri in State ex rel. Ranney v. School Dist. of City of Cape Girardeau, 237 Mo. 670, 141 S.W. 640 (1911) stated:

"The power of the board of education 'to make all needful rules and regulations for the organization, grading and government in their schools district' is expressly given by the statute (Rev. St. 1899, § 9764), by which its nature and extent must be judged; with the qualification, however, that neither the Legislature nor the board by its authority can make or enforce any rule inconsistent with the constitutional requirement that these schools shall be maintained for the gratuitous instruction of all persons in the state between the ages of 6 and 20 years. From this constitutional mandate it necessarily results that the Legislature has power to authorize, and that the school authorities have power, to the extent of such authorization, to make such rules as shall be needful for the orderly conduct of the schools, and to guard the moral and physical health of the pupils so as to make them available to all alike who may be entitled to their advantages. These rules may, and some of them necessarily will, deprive some pupils temporarily of the right to avail themselves of the facilities for instruction which they afford, but all must be adapted to the promotion and accomplishment of the paramount object contemplated by the Constitution. They cannot arbitrarily and unnecessarily deprive any beneficiary of the Constitution of any part of the right guaranteed to him. For example, a rule that no person should be enrolled in the public schools who had not attained the age of six years and one month would be evidently void, because tending only to defeat

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that object. On the contrary, a rule forbidding the attendance of persons afflicted with smallpox would be evidently valid because it would tend to promote that object. Between these extremes lies a vast field for the exercise of this rule-making power, which depends, in some instances, upon local or temporary conditions of which the courts cannot take judicial notice, and to which their attention must therefore be directed by pleading and evidence. . . ." 141 S.W. at 642

A school board, then, may make and enforce reasonable rules and regulations to insure the orderly conduct of the school. However, such rules and regulations cannot arbitrarily deprive a student of his constitutional right to receive a free public education. Thus, we conclude that a child between the ages of six and twenty, but not within the age limitation of the Compulsory School Attendance Law, may attend a public school on a part-time basis subject to the reasonable rules and regulations of the school district.

Inasmuch as your question concerning part-time attendance at a public school does not relate to any particular factual situation or school district regulation, we are asked to hypothesize all the instances in which a school district could validly exercise its power to regulate the attendance of pupils who are entitled to a free education as a matter of right but who do not come within the Compulsory School Attendance Law. We do not believe that this is appropriate for a legal opinion, and, therefore, reserve a determination for a future occasion when more specific factual circumstances are presented.

QUESTIONS NO. 3 AND 4

Your third and fourth questions relate to whether a child who is not within the age limitation of the Compulsory School Attendance Law but who is nevertheless entitled to a public school education as a matter of right may attend a public school for a part of the regular school day and a private school for the remainder of a school day. Although these questions do not relate to any specific factual situation, we notice that you have prefaced these questions by reference to part-time attendance of private school students at an area vocational school operated by a public school district. Thus, for purposes of this opinion we assume that questions No. 3 and 4 relate to whether private school students who are within the age group of children entitled to a public education as a matter of right but who are not within the age group of the Compulsory School Attendance Law may attend classes offered at an area

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vocational school while pursuing the rest of their education at a private school.

The practice whereby private school pupils attend a course offered in a public school for part of the school day and pursue the rest of their education at a private school for the remainder of the school day is generally known as "shared time" or "dual enrollment." See generally 65 Mich.L.Rev. 1224.

Under the Vocational Education Act of 1963 and the Vocational Education Amendments of 1968, 20 U.S.C.A. Sections 1241-1391, Congress has appropriated funds to the various states to assist with the establishment and maintenance of vocational education programs. The funds appropriated under these acts have been accepted by the State of Missouri, Section 178.430, RSMo 1969, and over the years "State Plans" for the administration of vocational education under the federal acts have been submitted by the state to the federal government. An "area vocational school" is defined in the federal regulations as either a separate, specialized high school or a department of a high school, junior college or university which is devoted exclusively or principally to vocational training. 45 C.F.R. Section 102.3(b)(1), 35 Federal Register No. 91, page 7335. An "area vocational school" is part of the overall educational program offered by those public school districts which have established such schools.

We believe that a public school district which operates an area vocational school has not only the authority but the duty to enroll private school students between the ages of sixteen and twenty in vocational education programs even though such students do not otherwise attend a public school. We understand that some state officials have reached a contrary conclusion on the basis that there is no express provision in the Vocational Education Act, Sections 178.420-178.580, RSMo 1969, or in any other part of the school laws authorizing a public school district to operate a dual enrollment program in an area vocational school. The shortcoming of such reasoning is adequately demonstrated by the fact that neither is there express statutory provision authorizing school boards to enroll and educate children between the ages of six and twenty years. It is clear, however, that a public school district has the inherent power, and the duty, to educate its resident children. See Opinion No. 100 dated January 18, 1966 (copy enclosed). As previously demonstrated, children between the ages of six and twenty years have a constitutional right to a public education, and the various school districts of the state are organized for the sole purpose of discharging the constitutional mandate to educate school age children. State ex rel. Carrollton School Dist. No. 1 v. Gordon, 231 Mo. 547, 133 S.W. 44, 51 (1910); School Dist. of Oakland v. School Dist. of Joplin, supra; Kansas

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City v. School Dist. of Kansas City, 201 S.W.2d 930 (Mo. 1947).
Article IX, Section 1(a) does not exclude those children attending non-public schools from receiving any benefit from the public school system.

In fact, we believe that to exclude private school children between the ages of sixteen and twenty from receiving shared time instruction in an area vocational school for the sole reason that such children choose to attend a private school for the basic school curriculum amounts to a denial of equal protection in violation of Article I, Section 2, Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The right of the pupil to attend a public school in Missouri is one founded upon our state Constitution. Having offered a public education to all children, the state must make it available on non-discriminatory terms. In State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938), the Supreme Court of the United States considered the lawfulness of the denial of a student's admission to the School of Law of the University of Missouri on the basis that he was a Negro. The court stated:

" . . . The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove that discrimination." 305 U.S. at 349-350

In overturning the separate but equal doctrine in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court of the United States stated:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate

Honorable Norbert J. Jasper

our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (Emphasis ours) 347 U.S. at 493

In our opinion, for the same reason that race would not be an acceptable basis for determining who is entitled to the benefits of a public vocational education program, the fact that a student attends a private school for part of the day is not a lawful reason for denying him access to a vocational education program provided by a public school district.

The Supreme Court of Michigan recently reached a similar conclusion upon analogous reasoning. In re Proposal C, 185 N.W.2d 9 (Mich. 1971). The court concluded that the exclusion of private school students from shared time instruction on public school premises on the basis of their status as private school students denied equal protection to the parent of the private school child:

"Proposal C [the constitutional initiative amendment] involves the fundamental right, protected by the Fourteenth Amendment of a parent to send his child to the school of his choice if it meets the state quality and curriculum standards. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Proposal C's restriction of this right under the Attorney General's Opinion by prohibiting nonpublic school children from receiving shared time . . . services at a public school can be justified only by a compelling state interest and by means necessary to achieve the objective. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

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(1969); and *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) . . .

* * *

"The Attorney General's interpretation of Proposal C severely curtails the constitutional right of school selection while the state interests advanced by Proposal C do not require this intrusion upon the exercise of a fundamental constitutional right. Consequently, excluding private school children from receiving shared time instruction . . . at the public school is a denial of equal protection. This does not mean that a public school district must offer shared time instruction . . . it means that if it does offer them to public school children at the public school, nonpublic school students also have a right to receive them at the public school." 185 N.W.2d at 27-28

Furthermore, we believe that excluding a student who attends a non-public school out of religious conviction from participation in shared time instruction in an area vocational school constitutes an unconstitutional infringement upon the free exercise of religion in violation of Article I, Section 5, Missouri Constitution and the First Amendment to the United States Constitution. The right to the free exercise of religion is one of the most fundamental freedoms of our society. A state imposed classification which conditions the practice of religious beliefs upon the surrender of other rights or other privileges without the justification of a compelling state interest constitutes a denial of religious freedom. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In that case the Supreme Court of the United States held that South Carolina's denial of unemployment compensation benefits to a Seventh Day Adventist because she refused for religious reasons to accept employment on Saturday infringed the Free Exercise Clause. The court stated:

". . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work,

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on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404

Whereas Sherbert concerned unemployment compensation benefits or privileges, the present case concerns the right of a school age child to a public school education, including vocational instruction. If the state were to condition the exercise of this right upon full-time attendance at a public school, the coercion upon the student who attends a non-public school out of religious conviction to forsake that religiously motivated practice in order to receive vocational instruction would be unmistakable. We can conceive of no legitimate state interest which would justify the conditioning of area vocational school instruction upon the surrender of one's constitutional right to attend a non-public school as an expression of religious motivation and conviction.

The same conclusion was reached by the Supreme Court of Michigan in In re Proposal C, supra:

"When a private school student is denied participation in publicly funded shared time courses . . . offered at the public school because of his status as a nonpublic school student and he attends a private school out of religious conviction, he has also a burden imposed upon his right to freely exercise his religion. The constitutionally protected right of free exercise of religion is violated when a legal classification has a coercive effect upon the practice of religion without being justified by a compelling state interest. Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) . . . As pointed out above, there are no compelling state interests advanced by Proposal C which justify the burden placed on the choice of attending a private school out of a religious conviction." 185 N.W.2d at 28-29

Thus, we conclude that a public school district operating an area vocational school has the authority and the duty to admit to its vocational education courses private school students who are entitled to a free public education as a matter of right but who do not come within the Compulsory School Attendance Law.

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Inasmuch as the private school students to which this opinion refers do not come within the terms of the Compulsory School Attendance Law, their attendance at an area vocational school on a shared time basis does not conflict with Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. banc 1966), wherein the Supreme Court of Missouri stated that it was a violation of the Compulsory School Attendance Law for a student to attend more than one school during the six hour school day.

There are also several constitutional provisions, state and federal, which must be considered in relation to shared time instruction in an area vocational school.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution, prohibits any state action respecting an establishment of religion. As most recently stated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Establishment Clause requires compliance with the following criteria:

" . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation omitted]; finally, the statute must not foster 'an excessive government entanglement with religion.' . . ."
29 L.Ed.2d at 755

For the following reasons, we believe that shared time in area vocational schools does not involve the establishment of religion. First, shared time in an area vocational school involves a legitimate secular legislative purpose--education. Secondly, shared time vocational instruction accommodates the student's decision to exercise his constitutional right to the education provided on public school premises and his desire to pursue religiously motivated activities elsewhere, and, therefore, it neither advances nor inhibits religion. Thirdly, shared time in area vocational schools does not foster excessive governmental entanglement with religion because the program is administered by public school authorities, the vocational instruction is provided on public school premises, secular teachers are employed to instruct the students, and vocational studies have no inherent ethical, spiritual or religious content or value nor may they be adapted to instilling the same.

Article IX, Section 5, Missouri Constitution, relating to the expenditure of public school funds provides as follows:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys,

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bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

An area vocational school, whether operated as a separate specialized school or as a department of a public high school, junior college or university, is a public school. Funds expended in connection with an area vocational school are therefore for the purpose of maintaining free public schools. In The Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, supra, the Supreme Court of Missouri held that the use of public school funds for the education of pupils at parochial schools was not for the purpose of maintaining free public schools. Contrary to the situation in Wheeler, vocational education takes place on public school premises under the exclusive control of the public school district. That students who attend a private school for their basic education may attend an area vocational school for its specialized instruction pursuant to their constitutional right to a public education does not change the public character of the area vocational school.

In McVey v. Hawkins, 258 S.W.2d 927 (Mo. banc 1953), the Supreme Court of Missouri held that the use of public school funds to transport parochial school students on public school buses was not for the purpose of maintaining free public schools. The significant element of that case, which is not involved in a consideration of shared time instruction at area vocational schools, is that public school funds were spent to help private school students attend a school other than a public school. In the instant case, public funds are spent exclusively for the support and maintenance of a public vocational school. Therefore, we conclude that Section 5 of Article IX does not prohibit shared time instruction in an area vocational school.

Secondly, because some private school students enrolled in an area vocational school may attend a church related school for the remainder of the day, the Missouri constitutional provisions respecting the prohibition against aid to religion should be considered. Article I, Section 7, and Article IX, Section 8, Missouri Constitution, provide respectively as follows:

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"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

In Berghorn v. Reorganized School Dist. No. 8, 260 S.W.2d 573 (Mo. 1953) and Harfst v. Hoegen, 163 S.W.2d 609 (Mo. banc 1941), the Supreme Court of Missouri held that the payment of public school funds to parochial schools which had been incorporated into the public school system amounted to unconstitutional aid to a school controlled by a sectarian denomination. Although the court did not undertake discussion of the Missouri constitutional provisions prohibiting aid to religious schools, the payment of public monies to these schools to sustain their operations obviously involved a prohibited aid both in purpose and effect. The distinction between the situation in Berghorn and Harfst and shared time in area vocational schools is clear. In the latter case the payment of funds to sustain the operations of an area vocational school, which is a public school, is neither for the purpose of aiding a church related school nor do such payments have the primary effect of aiding a church related school.

Some commentators state that, because of the prohibition against "indirect" as well as "direct" aid, the Missouri constitutional provisions prohibiting aid to religion are broader than the prohibitions contained in the First Amendment to the United States Constitution.

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Section 7, Article I, Missouri Constitution. We agree that the language of the Missouri Constitution relating to aid to religion is more explicit than the Establishment Clause of the First Amendment to the United States Constitution. However, we do not believe that the people of the State of Missouri intended to prohibit every form of legislation or appropriation of public money for a secular purpose, the benefit of which might in some remote way incidentally accrue to religiously affiliated schools.

There are many examples of legislation designed to satisfy a secular purpose in which there is no intention to aid religion or church related schools as such and the benefit accruing to religion or religious schools is only a collateral effect of the legislation. For example, when the state provides such services as sanitation, police and fire protection to the entire community, churches in the community benefit from such services. The construction of a street next to a religiously affiliated school indirectly benefits such school by providing easy access for its students. Public transportation also incidentally benefits churches and religiously affiliated schools by furnishing the means of attendance. State and local governments have long provided public libraries with books for use by all persons. Are the doors of a public library to be closed to students attending church related schools because the use of its facilities in connection with assignments for courses in their schools amounts to an unconstitutional "indirect" aid to the religious school? We think not. These are just some of the many examples of legislation which satisfy a secular interest and which have neither the purpose nor the primary effect of supporting or inhibiting religion. We are not prepared to make the facile assumption that the Missouri Constitution prohibits all legislation which might in some remote way incidentally benefit religion. Such a conclusion would express a hostility to religion which might result in direct conflict with Sections 5 and 7, Article I, Missouri Constitution, which prohibit discrimination on account of religion.

Because the experience and reasons behind the promulgation of the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution are common to the similar provisions in the Missouri Constitution, it is appropriate to consider the United States Supreme Court's discussion of the interplay between the two clauses. In Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), the Court upheld a released time program pursuant to which public schools released their pupils during the school day for religious instruction on premises away from the public school. Speaking for the court, Mr. Justice Douglas stated:

" . . . There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.

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And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'

* * *

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the

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religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . ." 343 U.S. at 312-314

This concept of accommodated neutrality runs throughout the Supreme Court's decisions concerning the First Amendment. See Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

Thus, we conclude that the Missouri Constitution does not prohibit all forms of legislation which might remotely or incidentally benefit religion when neither the purpose nor primary effect is to support religion as such but is, instead, to satisfy a legitimate, secular, state interest. We are not alone in this conclusion. At least two other states with constitutional provisions prohibiting "direct" and "indirect" aid to religion have concluded that it is not every benefit which might accrue to religion or religiously affiliated schools that is prohibited. See In re Proposal C, *supra*; Board of Education of Central School District No. 1 v. Allen, 228 N.E.2d 791 (N.Y. 1967), *aff'd* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). In Allen the Court of Appeals of New York held that a statute providing for the loan of free textbooks to school age children, including parochial school students, did not offend Section 3 of Article XI of the New York Constitution which is remarkably similar to Article I, Section 7 of the Missouri Constitution. The court's reasoning is instructive:

" . . . The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to

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parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: 'It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be dis-
countenanced. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them.' (Matter of Zorach v. Clauson, 303 N.Y. 161, 172, 100 N.E.2d 463, 467, affd. 343 U.S. 306, 72 S.Ct. 679, 97 L.Ed. 954.)
The architecture reflected in Judd would impede every form of legislation, the benefit of which, in some remote way, might inure to parochial schools. It is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such." (Emphasis ours) 228 N.Ed.2d at 794

Therefore, we conclude that shared time programs in area vocational schools would not involve prohibited aid to church related schools in violation of Article I, Section 7 and Article IX, Section 8 of the Missouri Constitution.

CONCLUSION

It is the opinion of this office that:

1. The parent, guardian or other person having charge, control or custody of a child under the age of seven or over sixteen does not come within the provisions of Section 167.031, RSMo 1969, relating to compulsory school attendance on a full-time basis. However, a person standing in the parental relation to a child between sixteen and eighteen years of age who has not completed the elementary school course in the public schools of Missouri, or its equivalent, does come within the provisions of Section 167.051(2), RSMo 1969, relating to compulsory attendance at a part-time school.

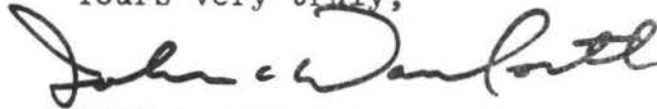
2. All children in the State of Missouri between the ages of six and twenty years have a constitutional right to a public school education. All children who are entitled to a public school education as a matter of right but who do not fall within the age group of the Compulsory School Attendance Law may attend a public school on a part-time basis subject to a school district's reasonable rules and regulations.

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3. Subject to reasonable rules and regulations applicable to all students, public school authorities operating an area vocational school must enroll a private school student who desires to participate in the vocational instruction offered at the school outside of the regular school day if the student is within the age group of children entitled to a public education as a matter of right. Shared time instruction in area vocational schools whereby students between the ages of sixteen and twenty attend the public vocational school for part of the regular school day and take the remainder of their courses at a church related school does not violate either the statutes or Constitution of Missouri or the United States Constitution.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett and John B. Mitchell, Jr. -

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN C. DANFORTH
Attorney General

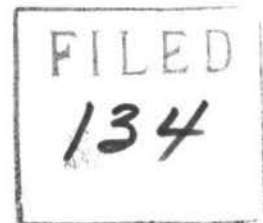
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BONDS:
INDUSTRIAL DEVELOPMENT:
DIVISION OF COMMERCE
AND INDUSTRIAL
DEVELOPMENT:

A municipality which issues and sells industrial development revenue bonds incurs no liability to pay for said revenue bonds other than the responsibility to apply the revenue received from the project for which the bonds were sold to retiring the bonds.

OPINION NO. 134

February 8, 1971



Mr. Henry Maddox, Director
Division of Commerce and
Industrial Development
P. O. Box 118
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Maddox:

This is in reply to your request for an official opinion from this office as follows:

"On several occasions this Division has been queried as to the extent of liability on the part of the municipality where Industrial Development Revenue Bonds are issued and sold for a manufacturing facility.

"This question arises at the community level, not only with the citizenry but the governing body of the municipality as well.

"Although it has been our practice to answer the question by referring to Sections 100.100 as well as 100.150 of the 1969 Missouri Revised Statutes, which appears quite clear that the liability

Mr. Henry Maddox

of the municipality is limited only by the revenue received from the project, we feel an opinion from your Department would dispel any doubts."

Section 100.100, RSMo 1969, states as follows:

"Any municipality may issue revenue bonds to provide funds for the carrying out of a project under sections 100.010 to 100.200. The revenue bonds shall be paid solely from revenue received from the project, and shall not be a general obligation of the municipality."

Section 100.150, RSMo 1969, states as follows:

"Revenue bonds issued under sections 100.010 to 100.200 shall not be payable from or charged upon any funds, other than the revenue pledged to the payment thereof, nor shall the municipality issuing the bonds be subject to any pecuniary liability thereon. Each revenue bond issued under sections 100.010 to 100.200 shall recite, in substance, that the bond, including interest thereon, is payable solely from the revenue pledged to the payment thereof and that the bond does not constitute a debt of the municipality within the meaning of any constitutional or statutory limitation."

In addition, Article VI, Section 27, of the Constitution of Missouri states as follows:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: (1) revenue producing water, gas or electric light works, heating or power plants; (2) plants to be leased or otherwise disposed of pursuant to law to

Mr. Henry Maddox

private persons or corporations for manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery; or (3) airports; to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality from the operation of the utility of the lease of the plant."

From the above and foregoing statutory sections and constitutional provision, it seems clear that a community incurs no liability from the issuance and sale of industrial development revenue bonds other than the responsibility of applying all revenue from the project for which the bonds were sold to retiring the bonds.

In the case of Ring v. City of Jefferson, 413 S.W.2d 292 (1967), the Supreme Court of Missouri in discussing industrial development revenue bonds said l.c. 298:

" . . . Even if this contention, so far as it goes, were sound, it does not take into consideration the force and effort of § 27 of Art. 6 [Missouri Constitution] which authorizes the proceeds of the bonds to be used to pay the cost of purchasing and constructing the facility as well as the provision that the bonds must be paid solely from the revenue derived from the facility."

The court further stated l.c. 300, 301:

" . . . The basic theory of revenue bonds as expressed in § 27 is to prevent the cities from becoming indebted for any of the projects authorized. The latter part expressly provides that the revenue bonds and interest shall be payable solely from the revenues derived from the facility. . . The language of § 27 and its constitutional context indicates an intention to avoid any general obligation or liability being imposed on the city in connection with the industrial plant proposed."

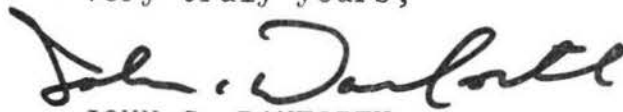
Mr. Henry Maddox

CONCLUSION

It is therefore the opinion of this office that a municipality which issues and sells industrial development revenue bonds incurs no liability to pay for said revenue bonds other than the responsibility to apply the revenue received from the project for which the bonds were sold to retiring the bonds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
HOUSING DEVELOPMENT:
TAXATION:

Chapter 215, RSMo 1969, establishes the Missouri Housing Development Commission for a valid public purpose, that is, facilitating the provision of housing for persons and families of low and moderate income who are unable to obtain adequate housing through ordinary commercial means and that such legislation does not contravene any provision of the Missouri Constitution.

OPINION NO. 140

July 6, 1971

Mr. Peter W. Salsich, Jr.
Chairman, Missouri Housing
Development Commission
3642 Lindell Boulevard
St. Louis, Missouri 63108



Dear Mr. Salsich:

This official opinion is issued in response to your request of recent date in which you present some questions regarding the constitutional validity of Chapter 215 RSMo 1969, relating to "state housing" and of the contemplated activities of the Missouri Housing Development Commission which is established by that act as a body corporate and politic.

Section 215.030, RSMo 1969, gives the Missouri Housing Development Commission the authority to make first mortgage loans:

"(1) . . .to finance the building or rehabilitation of residential housing designed and planned to be available at low and moderate rentals or to be sold to low and moderate-income families and others upon such terms as hereinafter designated; . . ."

The mortgages may be insured by the federal government, but are not required to be so insured.

The Commission also has the power under that section to:

Mr. Peter W. Salsich, Jr.

"(2) Insure any first mortgage loan, the funds of which are to be used to develop low and moderate-income residential housing . . .

"(3) To make or participate in the making of federally insured construction loans to sponsors of residential housing for occupancy by persons and families of low and moderate income. Such loans shall be made only upon determination by the commission that construction loans are not otherwise available, wholly or in part, from private lenders upon reasonably equivalent terms and conditions;

"(4) To make temporary loans, with or without interest, . . . to defray development costs to sponsors of residential housing for occupancy by persons and families of low and moderate income; . . ."

The other powers of the Commission as set out in Section 215.030 are auxiliary. These include the power to borrow money and issue bonds or notes (subsection 20) and the power to provide technical and consulting services (subsections 24 and 25).

Section 215.120 provides for the issuance of:

"1. . . negotiable revenue bonds or notes in such principal amount, as, . . . shall be necessary to provide sufficient funds for achieving its corporate purposes, including the making of mortgage loans for residential housing to be occupied by low and moderate income persons; . . ."

Section 215.050, RSMo 1969, provides for the establishment of a "Housing Development Fund" containing money appropriated by the legislature, money received in repayment of advances from the fund, and money made available from other sources. Money in this fund may be used:

"2. . . to make non-interest-bearing advances to nonprofit corporations to defray development costs of constructing or rehabilitating residential housing . . ."

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As a condition of making non-interest-bearing loans, the Commission must determine that the housing complies with the other standards of the act and that it appears that permanent financing will be available.

Section 215.120(4), RSMo 1969, provides:

"The state shall not be liable on notes or bonds of the commission and such notes and bonds shall not be a debt of the state, and such notes and bonds shall contain on the face thereof a statement to such effect."

Section 215.200, RSMo 1969, provides that the Commission is not obliged to pay taxes to the state or any local governmental unit:

". . . upon any of its property or upon its obligations or other evidences of indebtedness. . . the notes and bonds of the commission and the income therefrom shall at all times be exempt from taxation, . . . except for death and gift taxes, taxes on transfers, sales taxes, real property taxes and business and occupation taxes."

Section 215.250, RSMo 1969, provides that the Commission shall repay any appropriations made to it from the general revenue fund, as funds become available to it.

Section 215.010(5), RSMo 1969, reads as follows:

"'Low income or moderate income persons' means persons or families who are in low or moderate income groups and who cannot afford to pay enough to cause private enterprise in their community to build a sufficient supply of adequate, safe and sanitary residential housing."

The statutory plan, therefore, contemplates that the Commission is to promote housing development to be made available to persons who are not able to obtain satisfactory housing accommodations through normal private means. It is contemplated that the legislature will appropriate funds in order to permit the Commission to commence its work, and that advances may be made from the funds so appropriated on a temporary basis. The statute does not contemplate the subsidization of housing by the Commission, or out of state funds. It is contemplated that loans and advances, both

Mr. Peter W. Salsich, Jr.

temporary and permanent, will be repaid, and that the state will be reimbursed for its initial outlay. It of course cannot be said with assurance that any particular loan or advance will be repaid, or that the Commission's operations will permit it to reimburse the state within any foreseeable time. It is apparently considered, however, that the Commission may derive income from its operations, and that its income may be in excess of its expenditures.

The statute states clearly that the Commission may not incur any obligation of any kind which will constitute an obligation of the state.

In contrast to certain municipal housing authorities (Section 99.120, RSMo 1969) and land clearance for redevelopment authorities, (Section 99.420(4), RSMo 1969) the Commission does not have the power of eminent domain.

In considering questions of legislative power under the Missouri Constitution, it must be remembered that the powers of the General Assembly are plenary, except to the extent that there are specific inhibitions in the federal constitution, federal statutes, or state constitution. In the absence of specific limitation, the legislative action is valid. State ex inf. Dalton v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo. 1960).

Possible provisions of the Missouri Constitution which may be drawn into question by reason of Chapter 215 are as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, . . . Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States." (Article III, Section 38(a).)

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation; (Sec. 45, Art. IV, Const. of 1875, q.v. under Sec. 38(a) of this Article, ante.)

"(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual,

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association, municipal or other corporation; (Ibid.). . . ." (Article III, Section 39(1) and (2).)

"All property, real and personal, of the state, counties and other political subdivisions, . . . shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively . . . for purposes purely charitable, . . . may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void." (Article X, Section 6.)

"The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." (Article X, Section 15.)

The question, then, is whether Chapter 215 violates any of the provisions set out above. There is a presumption that any act adopted by the general assembly is valid and constitutional, and one who would challenge the law must demonstrate the unconstitutionality.

The apparent public purpose of the legislation is to make housing available to persons and families who are unable to obtain satisfactory housing on the private commercial market. It is not the practice of the Missouri legislature to accompany bills with recitals, findings, or declarations of purpose in the attempt to show justification for the legislation. We must therefore, consider the apparent purpose of Chapter 215.

The Missouri courts have consistently upheld legislation designed to provide housing for low-income families. Laret Inv. Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (1939) was decided prior to the adoption of the Missouri Constitution of 1945, and Bader Realty Investment Co. v. St. Louis Housing Au., 358 Mo. 747, 217 S.W.2d 489 (1949) was decided afterwards. Both cases hold, specifically, that property of the St. Louis Housing Authority, a public corporation, could properly be made exempt from taxation. The cases are also important in indicating the general public purpose behind provisions for housing for low-income persons and families.

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The Missouri cases are consistent with the great weight of authority in the United States, holding that the provision for low-cost housing for poor persons is a proper public purpose. Many cases are cited and discussed in the opinions.

Also important is the case of State ex. inf. Dalton v. Land Clearance for Redevelopment Auth., 364 Mo. 974, 270 S.W.2d 44 (1954) which holds that the clearance of blighted or insanitary areas is itself a public purpose justifying the expenditure of public funds and the exercise of the power of eminent domain. The case states very firmly that a law which exists for a valid public purpose is not rendered invalid simply because private individuals may derive special benefits from its operation and effectuation.

The Missouri cases sustaining public housing, and some cases from other states, have emphasized the "slum clearance" aspect of public, low-cost housing. The legislation now under consideration provides for moderate income housing as well as low income housing, and it may be thought that further analysis going beyond the prior housing cases is required.

It might appear that, at first blush, two advisory opinions from states recognizing the advisory procedure cast some doubt on the public purpose underlying Chapter 215. Opinion of the Justices, 351 Mass. 716, 219 N.E.2d 18 (1966) held that the provision of public housing for "moderate income" families did not in and of itself, indicate a valid public purpose. The opinion indicated that the measure under consideration might exist for a valid public purpose, but found fault in the legislature's failure to explain or define the meaning of "moderate income" housing. The Missouri statute does not have the feature the Massachusetts court criticized, in that Section 215.010(5) specifically indicates that moderate income housing is to include only housing for families who cannot obtain satisfactory housing on the private market. In a later case, Massachusetts Hous. F. Ag. v. New England Mer. Nat. B., 249 N.E.2d 599 (Mass. 1969), the Massachusetts court sustained a revised version of the statute which was the subject of its advisory opinion, on the ground that there could be a substantial relationship between provision of moderate income housing and slum clearance, and that provision of that type of housing might be necessary for permanent slum eradication. It seems clear that the court which rendered that opinion would have sustained the statute in its earlier opinion, had "moderate income housing" been clarified in the way that it is in the Missouri statute.

In Re Advisory Opinion, 158 N.W.2d 416 (1968) expressed the conclusion of the Michigan Supreme Court that the state legislature could find a public purpose in providing funds for the organization of a state housing authority, but that a proposed housing development fund and a capital reserve sinking fund would be established for private rather than public purposes. Michigan's constitution permits the appropriation of public funds for private purposes by

Mr. Peter W. Salsich, Jr.

two-thirds vote of the legislature, and for this reason the Michigan courts may define "public" in a somewhat restrictive manner. By the opinion in State ex inf. Dalton v. Land Clearance Auth., supra., moreover, the authority to appropriate money for a public purpose would include the authority to make all appropriations deemed reasonably necessary to that purpose, even though private individuals might derive incidental benefits. The Missouri courts would not be likely to split up the appropriation into public and private portions, as the Michigan court did.

In Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948), the Supreme Court of Illinois held that the easing of a housing shortage was itself a public purpose sufficient to sustain the appropriation of public funds. The opinion did not rely on purposes such as slum clearance and aid to the needy, which had served as justification in most prior housing cases. We believe that the Illinois case is of great significance in supporting the validity of Chapter 215 and related legislation.

In State ex rel W. Va. Housing Dev. Fund v. Copenhaver, 171 S.E.2d 545 (W.Va. 1969), the Supreme Court of Appeals of West Virginia held that a legislative act very similar to Chapter 215 existed for a valid public purpose. A corporation similar to the Missouri Housing Development Commission had been established by the legislature. Had this been a "private corporation" rather than a "public corporation", then the legislation establishing it would be an invalid special act under the West Virginia constitution. The court found, however, that the provision of housing for persons of low and moderate incomes who could not obtain the housing on the commercial market, represented a valid public purpose. The West Virginia statute contained recitals and findings in some detail, but we consider that the Missouri statute is sufficient on its face to disclose the conditions which the legislature sought to relieve in enacting the statute.

We understand that statutes similar to Chapter 215 are in effect in Illinois, New Jersey, Maine, Connecticut and North Carolina, but are not aware of any adjudication in these states.

We are confident that the Missouri courts would uphold the purpose of assisting low and moderate income families in the obtaining of satisfactory housing when they are unable to obtain this housing through commercial channels, as a valid public purpose. This is consistent with the approach of the Missouri cases discussed above and with cases from the great majority of the jurisdictions which have considered housing and urban renewal legislation. Most states have constitutional provisions similar to Missouri's with regard to the appropriation of public money for private purposes, and so cases from these other jurisdictions are quite persuasive.

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Since the Missouri statutes state expressly that the Commission has no power to create an obligation which is effective against the state, there is no pledging of the state's credit. This was expressly held in State ex rel W. Va. Housing Dev. Fund v. Copenhaver, supra., in construing similar constitutional provisions.

The provisions exempting the property and obligations of the Commission from property taxation are clearly severable from the balance of Chapter 215, and any decision holding these exemptions invalid would not connote invalidity of the other provisions of the chapter.

The Bader Investment Co. case, discussed above, would sustain the exemption on the ground that the Commission's activities constitute a "purely charitable purpose", within the meaning of Article X, Section 15 of the Constitution.

The state, furthermore, has the authority to decide the scope of the income tax laws, and to provide for exemption of the income bonds and notes of the Commission, in the hands of the purchasers. Article X, Section 6 deals only with exemption from property taxation.

CONCLUSION

It is the opinion of this office that Chapter 215, RSMo 1969, establishes the Missouri Housing Development Commission for a valid public purpose, that is, facilitating the provision of housing for persons and families of low and moderate income who are unable to obtain adequate housing through ordinary commercial means and that such legislation does not contravene any provision of the Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant Attorney General, Charles B. Blackmar.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

February 24, 1971

OPINION LETTER NO. 142

Honorable Richard G. Steele
Assistant Prosecuting Attorney
Cape Girardeau County
Cape Girardeau County Court House
325 Broadway
Cape Girardeau, Missouri 63701



Dear Mr. Steele:

This letter is in response to your opinion request in which you asked whether the total compensation provisions of Section 50.334, RSMo 1969, relating to circuit clerks precludes a circuit clerk from receiving change of venue fees pursuant to Section 483.560, RSMo 1969, and the fifty cent judgment fee which was discussed in Attorney General's Opinion No. 75, dated December 22, 1961, to Riley, interpreting Section 483.530, RSMo 1959.

Section 483.560, RSMo 1969, states:

"1. The clerk of the circuit court of such counties shall pay monthly into the county treasury the amount of all fees collected by virtue of his office except fees collected in cases of change of venue from other counties, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law.

"2. It shall be the duty of the county court to examine such monthly reports

Honorable Richard G. Steele

and to require the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

However, with respect to change of venue fees and the disposition of such fees, we refer you to Supreme Court Rules 51.17 and 51.18 which are similar to Sections 508.220, RSMo 1969 and 508.230, RSMo 1969.

That is, Rule 51.17 states:

"Whenever any change of venue is applied for in any civil cause from any circuit court of any county, or city constituting a county, to any other county or such city, in another circuit, the party or person applying for such a change of venue, shall, with his application, deposit with the clerk of the circuit court the sum of ten dollars; and thereupon, if such change of venue is awarded, the clerk of said court shall transmit said sum of ten dollars, together with the transcript and proceedings in the cause, to the clerk of the court to which the removal is ordered; and no transcript shall be transmitted or received by any clerk on such change of venue, as aforesaid, unless said sum of ten dollars shall accompany such transcript, provided however, that whenever any cause shall be transferred to another circuit by agreement of parties, such sum shall be paid by both parties, before any change of venue is awarded, in equal shares, and transmitted as aforesaid."

Rule 51.18 states:

"Said sum when received shall be paid into the county treasury in the same manner as other fees of the clerk of the court. All moneys received by the clerk

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of the circuit court of the city of St. Louis, under and by virtue of the provisions of this Rule and of Rule 51.17, shall be paid by him into the city treasury, and used for the payment of the salaries of the circuit judges and court stenographers of said city. If no change of venue is granted, the money paid under this Rule and Rule 51.17 shall be returned to the party or parties paying the same."

We believe that it is clear that the Supreme Court Rule controls, and under Rule 51.18, such sum has to be paid into the county treasury by the clerk of the circuit court to which the removal is ordered in the same manner as are other fees of the clerk of the court.

With respect to your question concerning the fifty cent fee, we note that in our opinion, cited above, we interpreted the provisions of Section 483.530, RSMo 1959, and as such provisions have since then been repealed, there is now no authority for a separate fifty cent fee for entering judgment or nolle prosequi. We are, accordingly, withdrawing Opinion No. 75, dated December 22, 1961 to Riley.

With respect to our reasoning generally concerning Section 50.334, and Section 483.530, we enclose Opinions No. 88, dated January 19, 1970, to Parker, No. 33, dated February 11, 1970, to Lauderdale with an April 6, 1970, Addendum to Opinion No. 33.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 88
1-19-70, Parker

Op. No. 33
2-11-70, Lauderdale

Addendum to Op. No. 33
4-6-70

OPINION LETTER NO. 143
Answer by Letter - Klaffenbach

Honorable Ray S. James
State Representative, 5th District
6421 Brookside Road
Kansas City, Missouri 64113



Dear Representative James:

This letter is in answer to your opinion request in which you ask:

- "1. Shall Magistrates open their courts on Sundays to permit filing of new criminal cases.
- "2. Does the Kansas City Police Department have the authority to accept a bond from a defendant, in criminal cases other than traffic."

We enclose our Opinion No. 59, dated March 1, 1954, to McGhee, which is self-explanatory and which we believe answers your first question.

With respect to your second question, Section 84.650, RSMo 1969, which applies to arrest procedure in Kansas city provides:

"The commissioners of police shall cause all persons arrested by the police to be brought before some magistrate or municipal judge within said cities, to be dealt with according to law. Proper police officers in charge of police station houses may, if the offense charged against any person is a bailable one, at the request of such person, take from him a recognizance in such sum as may seem to be

Honorable Ray S. James

sufficient and proper with sufficient sureties for his appearance at the proper time before some magistrate or municipal judge; but no attorney at law, police officer, constable or his deputy, and no official employee holding office under the municipality of the said cities, or the state of Missouri, and no clerk in the employ of such officer, officials or employees shall be accepted as surety upon such bond or bonds; the proper officers in charge of said station houses may administer oaths to parties qualifying as such surety or sureties; and may refuse to receive as such surety or sureties any and all parties with unsavory reputations or who, as professional bondsmen, tend to defeat the ends of justice, and no one shall be accepted as bondsman who shall have standing against him an unsatisfied judgment rendered on a forfeited bond."

The answer to your second question is therefore that the proper officer to receive such bail is the officer in charge of the station house.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 59
3-1-54, McGhee

SCHOOLS:

(1) A pupil between the ages of seven and sixteen enrolled in a nonpublic school may also attend courses on a part-time basis in a public technical-vocational school so long as the attendance at the public school is in addition to attendance for the six-hour school day at the nonpublic school. Such part-time attendance would be subject to reasonable rules and regulations on the part of the public school district. (2) The Compulsory School Attendance Law, Section 167.031, RSMo 1969, as interpreted by the Missouri Supreme Court in the Wheeler decision, does not require that a pupil attend one school for six consecutive hours each day provided that a total of six hours each day is spent in attendance at one school.

OPINION NO. 144

November 26, 1971



Honorable Ray S. James
State Representative
Fifth District
6421 Brookside Road
Kansas City, Missouri 64113

Dear Representative James:

This official opinion is issued in response to your request for a ruling on the following questions:

"I request your official opinion on the meaning of Section 163.031 RSMo., 1969."

* * *

"I request your official opinion on the question of whether or not a child enrolled in a nonpublic school may also attend courses on a part-time basis in a public technical-vocational school so long as the attendance of the public school is in addition to attending at least six hours in his nonpublic school.

"Also, I would appreciate your ruling as to whether or not the requirement to attend one school at least six hours requires the pupil to attend school for six consecutive hours, or may the six hours be divided by another intervening activity, such as, attending a different school."

As background for this opinion request, you furnished us the following information:

Honorable Ray S. James

"We are developing in Kansas City a central technical and vocational school. The school is operated by the public school district. A plan is being studied whereby pupils enrolled in nonpublic schools may also take advantage of the central technical-vocational school. We are aware that the Missouri Supreme Court in the case of Special District v. Wheeler ruled that the Compulsory Attendance Law required children to attend one school at least six hours each school day. However, it is further my understanding that the court affirmed a program where nonpublic school pupils attended public school classes in addition to attending six hours at their nonpublic school.

"I am interested in determining the application of Missouri law to situations, for example, where a nonpublic school pupil would attend a public technical-vocational school for one hour in the morning and then attend a nonpublic school for an additional six hours, or would attend a nonpublic school for six hours and then come to the public technical-vocational school for an additional hour. Another example would be where a nonpublic school child would attend his nonpublic school for two hours, come to the public technical-vocational school for an hour or two and then return to his nonpublic school for four additional hours or any other combination of hours so long as a total of six were spent in one of the schools attended."

We are enclosing herewith a copy of Opinion No. 133, dated October 28, 1971 which we believe answers your first question. Also, the Cole County Circuit Court's opinion in Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, which is discussed below with regard to question 2, supports our conclusion that a nonpublic school pupil between the ages of 7 and 16 may attend a public vocational school on a part-time basis so long as it is in addition to six hours spent in attendance at the pupil's regular school.

Your second question is whether, under Section 167.031, RSMo 1969, as interpreted by the Missouri Supreme Court in Special

Honorable Ray S. James

District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo., en banc, 1966), a pupil is required to attend one school for six consecutive hours or whether the six-hour school day may be interrupted by a pupil's attendance at a second school. We believe that the Wheeler decision stands only for the proposition that a student must attend one school for the regular six-hour school day. In Wheeler, the Court declared unlawful a program conducted by the Special District in which it provided speech therapy for parochial school children in buildings maintained by the Special District. "Parochial school children who desire to receive such therapy were released from the parochial schools for part of their regular six-hour day." (Emphasis supplied.)

The Court ruled that such a program was invalid because the Compulsory School Attendance Law required a child to attend one school for the entire six hour day.

"The parties stipulated that '* * parochial school children are released from their regular schools for part of their regular six-hour school day so that they may attend speech correction classes in buildings maintained by the Plaintiff District.' By statute it is mandatory that each child 'attend regularly some day school.' We are asked to change the statutory requirement to read 'some day schools' or to read 'some day school or schools.' We cannot do this. We find no ambiguity which would permit us to judicially ascertain the legislative intent. We must apply the statute as written. . . ." Id. at 63.

Therefore, under Wheeler, a student cannot attend school No. 1 for five hours and school No. 2 for one hour and satisfy the requirements of the Compulsory School Attendance Law. However, at no place in the Wheeler opinion does the Court hold that a student must attend school No. 1 for six consecutive hours. Neither the wording of the Compulsory School Attendance Law, Section 167.031, RSMo 1969, nor the definition of a school day in Section 160.041, RSMo 1969, nor any other statute require that a student attend one school for six consecutive hours to satisfy the Compulsory School Attendance Law.

Support for this conclusion is found in the Order of the Cole County Circuit Court in the Wheeler case, dated October 12, 1965, as amended on November 19, 1965. By a supplement to the agreed upon facts in that case, the Special District's program for the 1965-1966 school year was summarized as follows:

Honorable Ray S. James

"Beginning in September, 1965, and continuing up through the date of filing this Second Supplemental Agreed Statement of Facts, plaintiff District has offered speech correction services to parochial school children requiring the same in three of its own buildings. Plaintiff is informed that said parochial school children attend their respective parochial schools for at least six hours each school day and that the time said parochial school children attend speech correction classes in buildings maintained by the plaintiff District is in addition to the time spent in their parochial schools. (Appellant's Transcript on Appeal, pp. 78-79.)

The Circuit Court found nothing unlawful in this program:

"6. The practice of plaintiff, which commenced in September, 1965, of offering its service to school children enrolled in parochial schools of the County of St. Louis, State of Missouri, in buildings maintained by plaintiff is not in violation of Section 167.031 if said parochial school children attend their respective parochial schools for at least six hours each school day and that the time said parochial school children attend speech correction classes in buildings maintained by the plaintiff District is in addition to the time spent in their parochial schools."

This portion of the Court's Order was not appealed to the Missouri Supreme Court. See Special District v. Wheeler, 408 S.W.2d at 62.

CONCLUSION

Therefore, it is the conclusion of this office that:

(1) A pupil between the ages of seven and sixteen enrolled in a nonpublic school may also attend courses on a part-time basis in a public technical-vocational school so long as the attendance at the public school is in addition to attendance for the six-hour school day at the nonpublic school. Such part-time attendance would be subject to reasonable rules and regulations on the part of the public school district.

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(2) The Compulsory School Attendance Law, Section 167.031, RSMo 1969, as interpreted by the Missouri Supreme Court in the Wheeler decision, does not require that a pupil attend one school for six consecutive hours each day provided that a total of six hours each day is spent in attendance at one school.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

Enclosure

Opinion No. 133, October 28, 1971, Jasper

March 2, 1971

OPINION LETTER NO. 146

Answer by letter - Bartlett

Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

This letter is in response to your request for our review and certification of the State Plan, Title III-A, National Defense Education Act of 1958, for the fiscal year ending June 30, 1972, and for each succeeding fiscal year for which the National Defense Education Act of 1958 is effective and for which the provisions of this Plan are valid.

Our review has taken into consideration Title III-A of the National Defense Education Act of 1958, P.L. 85-864 (1958), as amended by P.L. 87-344 (1961), P.L. 88-210 (1963), P.L. 88-665 (1964), P.L. 89-329 (1965), P.L. 89-752 (1966), and P.L. 90-575 (1968); and Federal Regulations, 30 F.R. 7 (1965), 45 C.F.R. 141 (1970).

Based on this review, it is the opinion of this office that:

1. The Missouri State Board of Education, the State Agency named in the Plan, is the "State Educational Agency" as defined in the National Defense Education Act of 1958, 20 U.S.C. Section 403(e), which has authority under State law to administer the State Plan or to supervise the administration of the State Plan;
2. The State Board of Education has the authority under State law to develop, submit and administer or supervise the administration of the State Plan;
3. The State Board of Education has authority under State law to carry out the State Plan, and

Arthur L. Mallory

4. All State Plan provisions are consistent with State law.

In conjunction with this letter opinion which constitutes our official certification of this State Plan, we have completed the certification form attached to the State Plan (page 4).

Very truly yours,

JOHN C. DANFORTH
Attorney General

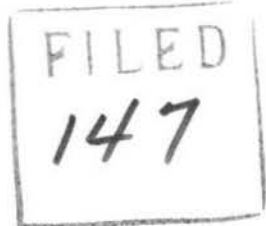
Enclosure

March 3, 1971

OPINION LETTER NO. 147

Answer by letter - Bartlett

Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan, Title II, Elementary and Secondary Education Act of 1965, for the fiscal year ending June 30, 1971, and for each succeeding fiscal year for which the Elementary and Secondary Education Act of 1965 is effective and for which the provisions of the Plan are valid.

Our review has taken into consideration Title II of the Elementary and Secondary Education Act of 1965 (P.L. 89-10) as amended by P. L. 89-750 (1966), P.L. 90-247 (1968) and P.L. 91-230 (1970); and Federal Regulations, 32 F.R. 2753 (1967), 45 C.F.R. 117 (1970).

Based upon this review, it is the opinion of this office that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 203(a)(1) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. Section 823 (a)(1)) to have authority, either directly or through arrangements with other State or local public agencies, to act as the sole agency to submit the State Plan;
2. The Missouri State Board of Education has authority under State law to carry out or to arrange for the carrying out of the programs described in the State Plan, and
3. All State Plan provisions are consistent with State law.

Arthur L. Mallory

In conjunction with this letter opinion which constitutes our official certification of the State Plan, we have completed the certification form which is attached to the State Plan (page 4).

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

CULTURAL DISTRICTS: House Bill No. 23, of the Seventy-fifth General Assembly, Section 184.350-184.388, V.A.M.S., can be amended to place the establishment of subdistricts in addition to the three subdistricts now established in the Metropolitan St. Louis Cultural District before the voters of St. Louis City and County for approval or rejection and for purposes of funding.

OPINION NO. 149

June 15, 1971

Honorable Edward E. Ottinger
Representative, 60th District
5912 Loughborough
St. Louis, Missouri 63109



Dear Representative Ottinger:

You requested this Office's opinion with regard to the following matter:

"If additional organizations can be added to the Cultural District of Metropolitan St. Louis after the Cultural District Proposal is passed by the voters of the city and county of St. Louis?"

You indicated in your letter that your question related to the Cultural District established under provisions of House Bill 23 of the Seventy-fifth General Assembly of the State of Missouri. Such bill now appears as Sections 184.350 to 184.388, V.A.M.S.

You advised that the election to which you referred in your opinion request and which is authorized by such Act was held in Metropolitan St. Louis and that the voters of St. Louis City and St. Louis County established the Metropolitan Zoological Park and Museum District which includes three cultural sub-districts as authorized by the Act.

It is our understanding that the question raised by your opinion request is whether such bill could be amended so that certain institutions and places could be defined as additional "subdistricts" in Section 184.352 and provisions made for an election to determine whether a tax should be levied for support of such subdistricts.

Honorable Edward E. Ottinger

It is our opinion that House Bill No. 23 can be amended to provide for additional subdistricts. The Cultural District Bill now provides for three subdistricts: Zoological; Art Museum and Museum of Science and Natural History. Each of these subdistricts was voted on individually.

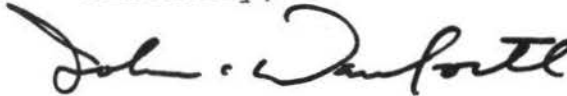
We see no reason why this bill could not be amended to provide for other subdistricts and for the establishment of such subdistricts and their funding to be submitted to the voters just as the original subdistricts were submitted.

CONCLUSION

It is therefore the opinion of this office that House Bill No. 23, of the Seventy-fifth General Assembly, Sections 184.350-184.388, V.A.M.S., can be amended to place the establishment of subdistricts in addition to the three subdistricts now established in the Metropolitan St. Louis Cultural District before the voters of St. Louis City and County for approval or rejection and for purposes of funding.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Sincerely,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

INSURANCE:
FARMERS MUTUAL INSURANCE
COMPANY:

A farmers mutual insurance company is a private commercial enterprise and may not be permitted to occupy office space in the county courthouse for the conduct of its business.

OPINION NO. 150

April 28, 1971

Honorable Ralph W. Gilchrist
Prosecuting Attorney
Polk County Courthouse
Bolivar, Missouri 65613



Dear Mr. Gilchrist:

This is in response to your request for an opinion on the question whether a farmers mutual insurance company may be allowed to occupy office space in the county courthouse from which it would conduct its business.

As indicated in the Opinion of the Attorney General No. 15, Carr, 2-23-55, to which you refer, a copy of which we enclose, a county court may not lawfully permit the usage of public property in the form of office space in a county courthouse for the conduct of a private commercial enterprise. To answer your question, then, we must consider whether a farmers mutual insurance company is a public corporation or a private commercial enterprise.

The difference between a public and private corporation was pointed out by the Supreme Court of the United States in the case of *The Trustees of Dartmouth College v. Woodward*, 4 L.Ed. 629, 668 (1819) as follows:

"Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses

Honorable Ralph W. Gilchrist

may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person."

The Supreme Court of Missouri has distinguished public financial institutions from private corporations. In *Jasper County Farm Bureau v. Jasper County*, 286 S.W. 381, 384 (Mo. 1926), the court stated:

"Nor are the appropriations provided for under the Farm Bureau Act gifts or grants of public money to private associations or societies, but are rather appropriations in payment for expenditures in carrying out the work of a public county institution. It is true the institution is in the form of a society or association, but the society or association is a public county institution, for the Farm Bureau Act makes it such by providing that the association or society make monthly and annual reports to the county court. . . ."

The Supreme Court recognized a private corporation in *Ruggeri v. City of St. Louis*, 429 S.W.2d 765, 768-769 (Mo. 1968) as follows:

"There is no question that the Convention and Tourist Board of Greater St. Louis is a non-profit association created for benevolent purposes by pro forma decree of incorporation. Its creation, status, and purposes do not in any way relate or connect with the municipal government of the City of St. Louis or any of its divisions. Irrespective of its worthwhile

Honorable Ralph W. Gilchrist

purposes and activities, and while its objects may be in a certain sense public, such a corporation, as distinguished from uses or objects, is private. State ex rel. Board of Control v. City of St. Louis, supra, 115 S.W. 1.c. 545. In Ketchie v. Hedrick, 186 N.C. 392, 119 S.E. 767, 31 A.L.R. 491, 494, an ordinance authorized payment of public funds to a chamber of commerce to be expended by it for purposes of bringing industry to High Point. In declaring the ordinance unconstitutional, the rationale for denying nongovernmental bodies the authority to receive and expend public funds was expressed: 'We know of no reason why the expenses and purposes of a nongovernmental body like a chamber of commerce should become necessary expenses of government. * * * they are actuated by patriotic motives to advance the public good. But they are in no sense governmental. They are neither elected nor appointed by public authority. They exercise no governmental duty. * *' . . ."

In the light of these judicial definitions, we must consider whether the statutes authorizing the formation of a farmers mutual insurance company constitutes such a company, a private corporation or a public institution of the county.

The legislature has enacted comprehensive statutory provisions covering the entire field of insurance. In 1953 it provided in Section 380.479, RSMo 1969, that "No farmers' mutual insurance company shall hereafter be organized or incorporated under the provisions of sections 380.481 to 380.570, but nothing in this section shall be construed as restricting or abridging in any manner the right of any farmers' mutual insurance company now incorporated and licensed to do business in this state from continuing to do business under the provisions of sections 380.481 to 380.570. . . ." The procedure for the incorporation of farmers mutual insurance companies now is set forth in Section 380.590, RSMo 1969, which provides in part as follows:

"Any number of persons, not less than one hundred, each owning insurable property in this state and within the territory in which they propose to operate of an insurable value of at least two thousand five hundred dollars, by complying with the provisions of sections 380.580 to 380.840 may form an incorporated

Honorable Ralph W. Gilchrist

farmers' mutual insurance company for the purpose of mutually insuring the members thereof as herein provided. . . ."

It is apparent that a farmers mutual insurance company formed for the purpose of mutually insuring the members thereof is a private corporation rather than a public institution of the county.

CONCLUSION

It is, therefore, the opinion of this office that a farmers mutual insurance company is a private commercial enterprise and may not be permitted to occupy office space in the county courthouse for the conduct of its business.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 15
2-23-55, Carr

July 7, 1971

OPINION LETTER NO. 152
Answer by letter- Romines

Honorable Barnes Griffith
Prosecuting Attorney
Dade County Courthouse
Greenfield, Missouri 65661

FILED

152

Dear Mr. Griffith:

This is in response to your request for an opinion relating to the furnishing of an ambulance service by Dade County under the provisions of Sections 67.300 and 137.065, RSMo 1969. Find enclosed former opinions of this office, Opinion No. 333, Graham, 1968; Opinion No. 254, Bassman, 1969; and Opinion No. 123, Bergbauer, 1969. By reference to these opinions, it can be seen that the county court may pursuant to Section 137.065, RSMo 1969, submit to the voters a proposed increase in county taxes for the establishment and maintenance of an ambulance service authorized by Section 67.300, RSMo 1969. We note, parenthetically, Section 67.300, supra, authorizes the county court to provide for an ambulance service without the use of a special election held pursuant to Section 137.065, supra.

You ask concerning the validity of a petition presented the county court.

Specifically, you question whether petitions presented pursuant to Section 137.065(2), RSMo 1969, must be verified. A reading of that section satisfies us that the petition need not be verified. In a previous opinion of this office, Opinion No. 31, Frick, 1959, copy enclosed, this office held in reference to Section 137.065, that the petition need merely contain the signatures of ten percent or more of the qualified voters and that upon its presentation it is mandatory the election be ordered.

Honorable Barnes Griffith

It is, therefore, our view that a petition presented pursuant to Section 137.065, RSMo 1969, to increase by special election the maximum tax rate of a third class county, need not be verified.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 333
7-30-68, Graham

Op. No. 254
8-7-69, Bassman

Op. No. 123
8-7-69, Bergbauer

Op. No. 31
10-8-59, Frick

February 19, 1971

Answer by Letter - Klaffenbach

OPINION LETTER NO. 153

Honorable Tony Heckemeyer
State Representative
District No. 157
Room 302E, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Heckemeyer:

This letter is in response to your opinion request in which you pose the following questions:

"Is it possible for a person to be simultaneously a resident of two states with respect to the residency requirements for holding office in the State of Missouri?

"What factors determine residency here in Missouri and is there any statutory method for determining residency?

"Would the signing of a document in another state, which under law is considered evidence to the effect that the signer of such document is a bona fide resident of that state, void a residency in Missouri?

"Are the facts that the personal property tax has not been paid here in Missouri, as required by law, and that the physical residence of said person and family is not within the boundaries of this state reliable factors in determining this case?"

Honorable Tony Heckemeyer

First of all, we observe that the Springfield Court of Appeals in Clarkson v. MFA Mutual Insurance Company, 413 S.W.2d 10 (1967) at 1.c. 13-14 amply illustrated the difficulties encountered in the defining "residence" by their holding from which we quote extensively as follows:

"Literally hundreds of cases have dealt with the meaning of 'reside' or 'live.' One bold, hardy explorer in this judicial jungle years ago listed more than one hundred reported decisions on each side of the question as to whether 'residence' and 'domicile' are synonymous, with Missouri cases cited in each list. Kennan on Residence and Domicile (1934), §10, pp. 22-27. Our Supreme Court, en banc, has observed that '[t]he words "residence," "place of abode" and "domicile" have many meanings in different connections * * *' [In re Duren, 355 Mo. 1222, 1232, 200 S.W.2d 343, 349-350, 170 A.L.R. 391]; and, more recently this court, per our departed brother, Ruark, J., in eschewing any attempt to define 'residence', graphically likened that word unto 'a slippery eel.' State v. Tustin, Mo.App., 322 S.W.2d 179, 180. Our present exploration convinces us that the 'eel' has undergone no metamorphosis. In fine, we must regard the terms 'reside,' 'resident' and 'residence' as ambiguous, elastic and relative, and the synonymous terms 'live' and 'living' as afflicted with the same frailties. Clark v. Industrial Accident Com'n. of Cal., 129 Cal.App. 536, 19 P.2d 44, 46.

"Although the instant appeal presents no need for us to essay definition of any of the foregoing terms, a task from which others less timorous than we have stood aloof, certain relevant judicial and statutory pronouncements should be noted here. At common law, the terms 'domicile' and 'residence' or 'resident' were used interchangeably and were treated as being synonymous [State ex rel. Kelly v. Shepperd, 218 Mo. 656, 666, 117 S.W. 1169, 1171-1172 (2); State ex rel. Stoffey v. La Driere, Mo.App., 273 S.W.2d 776, 781 (13)], and 'residence' and 'resident' are frequently, although not always, used in that sense now. Phelps v. Phelps,

Honorable Tony Heckemeyer

241 Mo.App. 1202, 1209, 246 S.W.2d 838, 844; State upon Inf. of Reardon v. Mueller, Mo.App., 388 S.W.2d 53, 58(8). But in whatever context the latter terms are used, they almost invariably imply and connote 'something of permanence or continuity at least for an indefinite period, to the exclusion of another contemporaneous residence' [In re Duren, supra, 355 Mo. at 1232, 200 S.W.2d at 350], that is, 'intended permanency' * * * not in the sense that the residence must never be changed, but in the sense that there is no intention to change it.' McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 283, 115 S.W. 1028, 1031. In this connection, we note also that our General Assembly has declared that '[a]s used in the statutory laws of this state * * * "[p]lace of residence" means the place where the family of any person permanently resides in this state, and the place where any person having no family generally lodges' [V.A.M.S. § 1.020 (9)], and that the St. Louis Court of Appeals has pointed out that this statutory definition 'merely codifies the presumption of law that would in any event exist without it.' State upon Inf. of Reardon, supra, 388 S.W.2d at 58. Although not entirely so [State upon Inf. of Reardon, supra, 388 S.W.2d at 60(10)], '[r]esidence is largely a matter of intention' [In re Lankford's Estate, 272 Mo. 1, 9, 197 S.W. 147, 148(2); In re Ozias' Estate, Mo.App., 29 S.W.2d 240, 243], hence an established residence is not lost by temporary absence therefrom, either on business or on pleasure, with no intention to abandon that residence or acquire another."

In answer to your first question with respect to whether or not a person may simultaneously be a resident of two states with respect to Missouri residency requirements for holding office, our answer is that, at least generally speaking, a person may not be a resident of another state and at the same time meet residency requirements for an office in Missouri.

In answer to your second question concerning what factors determine residency in Missouri and whether there is any statutory

Honorable Tony Heckemeyer

method for determining residency, we believe that the above quotation from the Clarkson case answers your question.

In answer to your third question concerning whether the signing of a document in another state declaring a residence in that other state would void a residency in Missouri, our answer is that the execution of such a document would be only one item of evidence to be considered with respect to such person's actual and bona fide residency in Missouri.

In answer to the first part of your fourth question concerning whether the payment of personal property tax in Missouri is a factor in determining residency, it is our view, of course, that there is a presumption that a person will follow the requisites of the law in the payment of his taxes and that if he does not pay his taxes as a resident such a fact would be considered in evidence, but would not be conclusive. Likewise, with respect to the second part of your fourth question concerning "physical residence" of a person outside the limits of the state of Missouri, as has been noted in the Clarkson case, temporary absence from the state does not imply the abandonment of an established residence if there is no attempt to abandon that residence or acquire another. This again is another factor to be considered but is not conclusive.

Finally your opinion request asks concerning whether a certain individual qualifies as magistrate judge by reason of a question concerning his residency. Whether or not this individual does qualify as magistrate judge is a mixed question of law and fact and an actual controversy and therefore a question we do not purport to be able to determine by an opinion of this office.

Very truly yours,

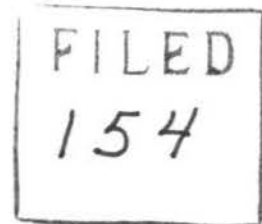
JOHN C. DANFORTH
Attorney General

June 14, 1971

Answer by letter-Craft

OPINION LETTER NO. 154

Honorable Joe D. Holt
Representative, District 102
Room 405, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Holt:

This is in answer to your letter requesting an opinion with respect to the following matter:

"Section 362.105 of the Revised Missouri Statutes concerns the general powers and authority of banks and trust companies. Subsection (5) of that section specifically provides that banks may 'invest in a bank service corporation' pursuant to the Bank Service Corporation Act. However, there appears to be a dearth of case law regarding the specific subject of banks acting as holding companies.

"It would further be appreciated if your office would provide an Attorney General's opinion which interprets or construes the law in Missouri with regard to holding companies in general and the legality thereof in Missouri."

This office has not issued any opinions with respect to the propriety of banks acting as holding companies. With respect to the power granted by Section 362.105(5), this power enables Missouri banks and trust companies to invest in corporations established in accordance with Title 12, U.S.C.A., Sections 1861-1865, bank service corporations. A bank service corporation is defined in Section 1861(c) as follows:

"The term 'bank service corporation' means a corporation organized to perform bank services

Honorable Joe D. Holt

for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a Federal supervisory agency."

Similarly, by Section 1864, a bank service corporation is limited to the performance of "bank services for banks." In Section 1861(b) the term "bank services" is defined as follows:

"The term 'bank services' means services such as check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a bank."

The purpose of the federal act is described in Volume 2, U.S. Code Congressional and Administrative News, 87th Congress, Second Session, 1962 at page 3878, et seq. There (at page 3879) the purpose of the bill is explained as follows:

"The purpose of H.R. 8874 is to enable banks to make use of modern automated equipment by means of stock ownership in a jointly owned bank service corporation.

"Much of this equipment is too expensive for a small or medium-sized bank to purchase for its own use. . . ."

Your letter also requests that we provide an Attorney General's opinion ". . . which interprets or construes the law in Missouri with regard to holding companies in general and the legality thereof in Missouri."

Chapters 361 and 362, RSMo, do not contain statutes which specifically deal with bank holding companies, and we believe that your question is too general for this office to make a ruling but that a ruling can be made only on a specific factual situation.

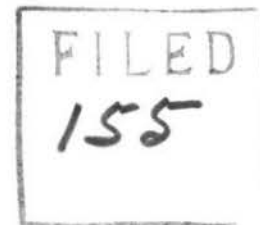
Yours very truly,

JOHN C. DANFORTH
Attorney General

April 1, 1971

Answer by letter-Wood

OPINION LETTER NO. 155



Mr. Gene Sally, Director
Department of Community Affairs
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Sally:

This is in response to the request from your office for my opinion as to the ability of the Department of Community Affairs to legally participate in comprehensive planning assistance grants administered by the Secretary of the United States Department of Housing and Urban Development pursuant to Section 701 of the Housing Act of 1954, as amended (40 U.S.C.A., Section 461). The Housing Act authorizes the Secretary to make grants to "official state planning agencies" for "comprehensive planning." Comprehensive planning is defined by the Act to include preparation of general plans for governmental guidance relating to patterns and intensity of land use, provision of public facilities and services, and development and utilization of human and natural resources.

The Department of Community Affairs is authorized and directed by Missouri law to:

"Exercise the state's responsibility for administering, supervising, coordinating and generally performing the role of state government as set forth in those federal programs concerning community affairs which are assigned to the department by the general assembly or by the governor;" (Section 251.030(8), RSMo 1969)

". . . accept grants and other financial assistance and may consult, cooperate with, assist, make and enter into contracts with other boards, commissions, agencies and institutions of this state, with local and federal

Mr. Gene Sally

governments, and private organizations, upon such terms as may be mutually agreed upon, . . ." (Section 251.090, RSMo 1969)

". . . contract for, receive and utilize grants or other financial assistance made available by the state or federal government or from any other source, public or private, for performing the functions of the state office. . . ." (Section 251.190(2), RSMo 1969)

The Department has been conferred the following specific powers with regard to planning:

"The department of community affairs is hereby designated as the official state planning agency for the purpose of providing planning assistance to counties, municipalities, metropolitan planning areas, and regional planning commissions herein created when requested by such local governmental unit or planning commission to do so, and for such purposes is authorized to:

"(1) Contract with public agencies or private persons or organizations for any purposes of [this law] . . ." (Section 251.170, RSMo 1969)

". . . develop a comprehensive state plan;" (Section 251.190(4), RSMo 1969)

The law defines comprehensive state planning to include the coordination of planning activities for all federal assistance and grant-in-aid programs, which require comprehensive planning as prerequisites for eligibility (Section 251.180(13), RSMo 1969).

In view of the statutes, it is my opinion that the Department of Community Affairs is an official state planning agency within the meaning of Section 701 of the Housing Act of 1954, and that the Department may legally participate with the Secretary of Housing and Urban Development in comprehensive planning assistance grants pursuant to said federal law.

I call to your attention Section 33.085, RSMo 1969, requiring copies of applications for federal funds, including a description of the project therein contemplated, to be supplied to the Director of the Budget, the legislative Fiscal Officer, the Chairman of the

Mr. Gene Sally

Missouri House and Senate Appropriations Committees and the Minority
Floor Leaders of the Senate and the House.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
SCHOOL BUSES:

A six-director school district in the State of Missouri may contract with a private or parochial transportation system to provide the transportation services which the board is authorized to furnish pursuant to Section 167.231, RSMo 1969.

OPINION NO. 156

May 3, 1971

Honorable George P. Dames
Representative, District 104
Room 411B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Dames:

This official opinion is issued in response to your request for a ruling on the following question:

"The Fort Zumwalt School District has had the practice of contracting transportation from private and parochial schools. Some of these agreements for hauling children by private and parochial schools for the public schools is by the mile and some per student.

"What I want to know is if it is legal and constitutional for public schools to have these agreements with private and parochial transportation systems."

We understand your inquiry to be whether it is legal in the State of Missouri for a six-director school district to contract with a private party to provide transportation for children to and from school. We are assuming that a reasonable price is paid by the six-director school district for this transportation.

In Attorney General's Opinion No. 104, dated March 26, 1970, to Honorable John E. Downs (copy enclosed), we concluded that a board of education could legally contract with private bus owners to provide the transportation authorized by Section 167.231, RSMo 1969.

Your opinion request raises the further question of whether a six-director school district can contract with a parochial transportation system to provide the transportation service required by

Honorable George P. Dames

the school district. Based on the reasoning in Attorney General's Opinion No. 56, dated February 4, 1970; Opinion No. 164, dated June 2, 1966; and Opinion No. 354, dated December 19, 1968 (copies of which are enclosed herewith), we do not believe that a contract between a six-director school district and a parochial transportation system for the transportation of public school children to and from their public schools would be prohibited under the Missouri Constitution. Two Missouri constitutional provisions--Article I, Section 7, and Article IX, Section 8--prohibit the use of public money to aid any religious school. (See Opinion No. 56 for the text of these provisions.) Consistent with the reasoning and conclusion of Opinion No. 56, there is no gift, subsidy or aid to religion where reasonable compensation is paid to a parochial transportation system for performing a service which the public school district cannot provide for itself at a lesser expense or which it cannot obtain elsewhere at a lesser expense.

CONCLUSION

Therefore, it is the opinion of this office that a six-director school district in the State of Missouri may contract with a private or parochial transportation system to provide the transportation services which the board is authorized to furnish pursuant to Section 167.231, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 104
3-26-70, Downs

Op. No. 56
2-4-70, Burch

Op. No. 164
6-2-66, Wheeler

Op. No. 354
12-19-68, Morton

March 10, 1971

Opinion Letter No. 158
Answered by Klaffenbach

Honorable Thomas A. Walsh
State Representative
52nd District
St. Louis, Missouri 63106



Dear Representative Walsh:

This letter is in response to your opinion request in which you ask the following question:

"A certain individual, while a resident of St. Louis County, died on January 7, 1970, and his will was admitted to probate in the Probate Court of St. Louis County, Missouri, and said estate remains open and undistributed.

"At the time of his death, the said individual owned a one-third share in a partnership whose office and place of business and tangible personal property owned by said partnership was then (at time of said partner's death) and is now in the City of St. Louis. His proportionate share in said partnership was listed and appraised by his Executor in the probate estate in St. Louis County. There are two surviving partners.

"The Department of Revenue of St. Louis County, Assessor's office, contends that it should assess, against the deceased partner's estate, personal property taxes for the year 1971 on decedent's one-third interest in the tangible personal property owed by said partnership even though entirely located in the City of St. Louis. Apparently, the Assessor relies on Section 137.090, R.S.Mo. 1969.

"In resisting such assessment, the Executor relies on Attorney General Opinion No. 15, CASLAVKA, 7-28-54, and Section 358.260, R.S.Mo. 1969 (a section of the Uniform Partnership Law).

"May the Assessor of St. Louis County lawfully make such an assessment for 1971 against decedent's estate, taking

Honorable Thomas A. Walsh

into consideration all the facts supplied herein?"

We have examined our Opinion No. 15, dated July 28, 1954, issued to the Honorable John R. Caslavke, and the opinion to which it refers, Opinion No. 57, dated March 10, 1950, issued to the Honorable W. V. Mayse, and, while we remain of the view that these opinions are correct, the Caslavka opinion was not based on the precise set of facts which you pose.

Section 137.090, R.S.Mo. 1969, states:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except that houseboats, cabin cruisers and automobile trailer houses used for lodging shall be assessed in the county where they are located and tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction; provided, that no tangible personal property shall be simultaneously assessed in more than one county."

Section 358.310(4), R.S.Mo. 1969, provides that the death of any partner is a cause of dissolution of a partnership. Section 358.420, R.S.Mo. 1969, with respect to the estate of a deceased partner states:

"When any partner retires or dies, and the business is continued under any of the conditions set forth in subsections 1,2,3,4,5, and 6 of section 358.410, or subdivision (2) of subsection 2 of section 358.380 without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by subsection 8 of section 358.410."

We also note that Section 358.250 R.S.Mo. 1969 provides in part:

Honoable Thomas A. Walsh

"2. ... (4) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose."

Apparently from the facts set forth in your letter the value of the interest of the deceased partner in the partnership has not been ascertained pursuant to Section 358.420, but instead the partnership has been continued and his proportionate share, however determined, was listed and appraised by his executor in the probate estate in St. Louis County.

It is our view that if the decedent's interest in a partnership that is continued under Chapter 358, with respect to tangible personal property, remains partnership property the Caslavka opinion would be applicable.

Nevertheless we are also of the view that the question which you present concerns a live issue and an actual controversy and, as such, is not the proper subject of an opinion under Section 27.040, R.S.Mo. 1969, relative to the issuance of opinions by this office.

We conclude that, although we have expressed our views in a general fashion, we should not decide a controversy between private individuals and political subdivisions and for that reason must respectfully decline to determine the issues involved.

Very truly yours,

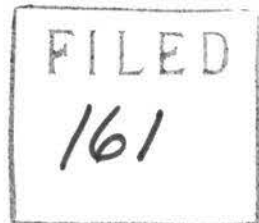
JOHN C. DANFORTH
Attorney General

Enclosures: Opinion No. 15
7-28-54, Caslavka

October 12, 1971

Answer by letter-Gardner

OPINION LETTER NO. 161



Honorable Robert S. Drake, Jr.
Prosecuting Attorney
Benton County Courthouse
Warsaw, Missouri 65355

Dear Mr. Drake:

This is in response to your request for an official opinion on the question whether under Section 49.110, RSMo 1969, one county judge in a third class county shall receive mileage for travel in his personal automobile for the purpose of inspecting county roads when the trip is made without the knowledge of the other two judges or an order of the county court authorizing the travel as necessary.

We are enclosing a copy of our Opinion No. 350 and 351, issued September 30, 1969, to the Honorable Haskell Holman holding that a county court may in its discretion reimburse county officers for travel expenses necessarily and indispensably incurred in the performance of the duties of their office. It appears, therefore, that the county judge to which you refer in your opinion request may be paid mileage for inspecting county roads if the county court finds that his travel expenses were necessarily and indispensably incurred in the performance of his duties.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 350 & 351
9-30-69, Holman

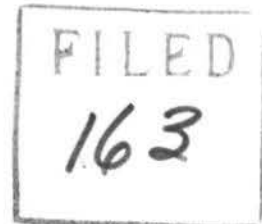
COMPENSATION:
COUNTY TREASURER:

The county treasurer of a county which became a second class county January 1, 1967, said treasurer having been appointed by the Governor in 1971 to serve until a duly elected county treasurer can be installed on January 1, 1973, pursuant to Section 54.010, sub. 2, RSMo 1969, is filling out an unexpired term of office and, as such, is entitled to receive only the compensation provided by law for the treasurer of a second class county who was elected at the November 1968 election.

OPINION NO. 163

April 1, 1971

Honorable Daniel M. Buescher
Prosecuting Attorney
Franklin County Court House
Union, Missouri 63084



Dear Mr. Buescher:

This is in response to your request for an opinion concerning the problem of the compensation due a county treasurer appointed by the Governor to a two year term in a new second class county prior to the first election for a county treasurer in such a county.

It is our understanding that Franklin County became a second class county on January 1, 1967. No election has been held to fill the vacancy of county treasurer in this new second class county. The county treasurer, who was elected at the general election in November 1966, when Franklin County was still a third class county, served in that capacity until December 31, 1970, at which time his term of office expired. The Governor appointed a county treasurer for Franklin County to serve a two year period beginning January 1, 1971 and ending December 31, 1972. On January 1, 1973, the first duly elected county treasurer in this new second class county will take office.

Enclosed is a copy of Opinion No. 34, issued January 9, 1970, to the Honorable George W. Parker, State Representative, in which we discussed the problem arising when a county changes from a third class to a second class county. We noted that Section 54.010, sub. 2, RSMo 1969, only provides for an election for a county treasurer in a second class county every four years with the next one to be held in November, 1972. Therefore, noting the provisions of Section 105.030, RSMo 1969, we concluded that any vacancy arising in this office prior to that time should be filled by a Governor's appointment.

In State on inf. Taylor v. Kiburz, 208 S.W.2d 285 (Mo. en banc 1947), the Missouri Supreme Court held that a vacancy arises as a

Honorable Daniel M. Buescher

matter of course when a new office is created. Since the Governor is empowered to fill vacancies in office, his appointee, upon assumption of the duties of the office, is entitled to receive the compensation provided for such office by law. Section 54.250, RSMo 1969, provides that a county treasurer in a second class county shall receive an annual salary of \$11,000 for his services. In addition, Section 54.275, RSMo 1969, provides an additional compensation of \$1,000 for the county treasurer in class two counties.

However, the current salary level was set by the legislature in the 1969 session. Prior to this time, county treasurers in second class counties received an annual salary of \$8,000 pursuant to Sections 54.250, 54.255, and 54.275. See Laws 1969, page ____, H.B. 374.

Enclosed is a copy of Opinion No. 62, issued June 30, 1961, to the Honorable William B. Milfelt, in which we held that a county auditor in a second class county, appointed by the Governor after the county had become a county of second class, was not entitled to the salary increase provided by statute enacted prior to his appointment because, in reality, such individual was filling out an unexpired term of office which began before the salary increase was adopted. This was true even though such county was not entitled to an auditor as of the preceding election date for county auditors inasmuch as it was not then a county of the second class. Following the reasoning of that opinion, we now conclude that the County Treasurer of Franklin County is entitled to receive only that compensation provided for the office of county treasurer in a second class county by law on January 1, 1969, the date upon which the current term of office of second class county treasurers commenced.

CONCLUSION

It is the opinion of this office that the county treasurer of a county which became a second class county January 1, 1967, said treasurer having been appointed by the Governor in 1971 to serve until a duly elected county treasurer can be installed on January 1, 1973, pursuant to Section 54.010, sub. 2, RSMo 1969, is filling out an unexpired term of office and, as such, is entitled to receive only the compensation provided by law for the treasurer of a second class county who was elected at the November 1968 election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 62
6-30-61, Milfelt

Op. No. 34
1-9-70, Parker

May 4, 1971

Answer by letter-Gardner

OPINION LETTER NO. 164

Honorable Hal E. Hunter
Prosecuting Attorney
New Madrid County Courthouse
New Madrid, Missouri 63869

Dear Mr. Hunter:

This is in response to your request for an opinion on the questions which you submitted as follows:

"The recent statutes setting the pay of County Assessors of third class counties removes them from fee schedule and sets a definite amount of annual salary for them and also, provides that they may appoint deputies and clerks.

"Our question is that whether or not such deputies or clerk must be hired with the approval of the County Court and does the approval of the County Court include the right to approve salaries on these individuals.

"In other words, does the County Court still have the right to determine who shall be paid from County funds and who must be paid from the Assessors own funds."

Your question arises under the first two sentences of Section 53.071, Senate Bill No. 1, Third Extra Session, 75th General Assembly, which provides as follows:

"For the performance of their existing statutory duties and for the additional duties set forth in sections 53.081 and 53.091, each county assessor, except in counties of the first

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class having a charter form of government, shall receive an annual salary for his services and shall, subject to the approval of the county court, appoint the additional clerks and deputies that he deems necessary for the prompt and proper discharge of the duties of his office. A portion of each county assessor's salary and of the salaries for his clerks and deputies shall be paid by the state in an amount equal to the sum paid by the state for assessors', clerks', and deputies' compensation in that county in the year 1969, and the remainder of the assessors' salary and the salaries for his clerks and deputies shall be paid by his county. . . ."

Under the language of this statute, it is the assessor who appoints the additional clerks or deputies that he deems necessary for the prompt and proper discharge of the duties of his office; and it is the function of the county court to approve the appointment. In other words, the assessor shall appoint the persons of his selection, which appointments shall be subject to the approval of the county court. The responsibility is thus, in a degree divided, but the initiative, the power to make the selection which the county court shall approve or disapprove, is given to the assessor.

The word "approval" has different meanings, depending upon the context in which it is found and the subject matter to which it is applied. The giving of approval has been said to be a ministerial act. *Better Built Homes & Mortgage Co. v. Nolte*, 249 S.W. 743 (St. L.Ct.App. 1923). On the other hand, the giving of approval has been held to require the exercise of judgment and discretion. *Baynes v. Bank of Caruthersville*, 118 S.W.2d 1051 (Mo. 1938). Under the first interpretation as applied to Section 53.071, the county court would have no power to disapprove the appointment of an additional clerk or deputy selected by the assessor. Under the second interpretation, the county court would have the power to disapprove the appointment of any person selected by the assessor.

In Section 53.071, it appears that the word "approval" is used by the legislature to express a supervisory power placed in the county court as a restraint upon the actions of an elected officer of the county. In these circumstances, the word "approval" must be given the second interpretation; and, therefore, the county court in New Madrid County has the power to approve or disapprove the appointment of additional clerks or deputies by the assessor.

We come now to the question whether the approval of the county court includes the power to fix the salaries of the assessor's clerks

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and deputies. Section 53.095, RSMo 1969, which provided in part that "The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. . . ." was repealed when Section 53.071, supra, became effective September 1, 1970. Paragraph 2 of Section 53.071 provides that ". . . Each clerk and deputy appointed by the assessor shall be paid his salary in equal monthly installments by his county. . . ." There is no provision authorizing the assessor to fix the compensation of such clerks and deputies.

Section 50.540, RSMo 1969, provides in pertinent part as follows:

"4. . . . The budget officer shall recommend and the county court shall fix all salaries of employees, other than those established by law, except that no salary for any position shall be fixed at a rate above that fixed by law for the position. . . ."

It therefore follows that deputies and clerks may be employed by the assessor in third class counties only with the approval of the county court and that the salaries of such deputies and clerks shall be fixed by the county court.

Yours very truly,

JOHN C. DANFORTH
Attorney General

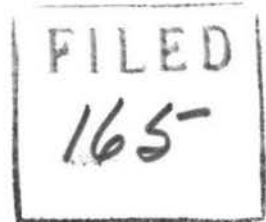
COUNTY COLLECTORS:
COMPENSATION:

In regard to determining the rates of commissions of county collectors of third class counties whose offices fall within subsection 14(a) of Section 52.260, RSMo 1969, insofar as county collectors are concerned: 1. The phrase "tax bills placed in his hands" as referred to in subsection 14(a) of Section 52.260, RSMo 1969, does not include back taxes for prior years. 2. A collector is entitled to a commission for collecting back taxes for prior years only in accordance with Section 52.290, RSMo 1969.

OPINION NO. 165

April 8, 1971

Honorable Hal E. Hunter, Jr.
Prosecuting Attorney
New Madrid County
New Madrid County Court House
New Madrid, Missouri 63869



Dear Mr. Hunter:

This is to acknowledge receipt of your request for an official opinion from this office which reads in part as follows:

"My office is in need of an opinion from your office interpreting Section 52.260 of the R.S.Mo. 1969 with particular reference to paragraph 14 subparagraph (a), wherein it says that the Collector shall retain as commission 'on all sums collected up to and including 80% of the total amount of the tax bills placed in his hands, 1/2 of 1% commission; on all sums collected over 80% and up to and including 95%, 1% commission; on all sums collected over 95%, 2% commission;'. "

"If the words contained in subparagraph (a) of said Section referring to a total amount of tax bills placed in his hands refer to current taxes then the Collector of New Madrid County is entitled to retain additional commissions inasmuch as his collections exceed 80%. If these words mean that the total amount

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of the tax bills placed in his hands include current taxes and back taxes, then the collections do not amount to 80% and it results in a change of commissions.

"This question was raised in the immediate audit and I have advised the County Collector, and he has agreed, to place the disputed sums in escrow until such time as we can receive your opinion and both parties will abide by the opinion of your office."

It is submitted that the issue for consideration is whether or not the phrase "tax bills placed in his hands" includes only taxes for the current year or whether this phrase includes back taxes for prior years.

Statutory provisions relating to the compensation of county collectors of third class counties are found in Sections 52.250 through 52.290, RSMo 1969. Section 52.250 provides that collectors in third class counties shall receive one half of one percent of all current taxes collected, including current delinquent taxes, but exclusive of all current railroad and utility taxes collected. This compensation is exclusive of and unaccountable in the maximum commissions provided in Sections 52.260 to 52.280. Section 52.260 provides that the collector in counties not having township organization shall collect and retain commissions for collecting all state, county, bridge, road, school, and all other local taxes, including merchants', manufacturers', and liquor and beer licenses, other than back, delinquent, and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees. It is further provided in subsection 14(a) of Section 52.260, that in all counties wherein the total amount levied for any one year exceeds two million dollars and is less than four million dollars; the collector of revenue shall receive the following commissions for collecting the sums he is authorized to collect:

"(a) On all sums collected up to and including eighty percent of the total amount of the tax bills placed in his hands, one-half of one percent commission; on all sums collected over eighty percent and up to and including ninety-five percent, one percent commission; on all sums collected over ninety-five percent, two percent commission; . . ."

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Section 52.270 in referring to limits on commissions, provides in subsection (3) that the limitation applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes nor to fees provided by Section 52.250. Section 52.290 specifically provides that the collector in all counties shall be allowed a commission for the collection of delinquent and back taxes of two percent on all sums collected to be added to the face of the tax bill and collected from the party paying the tax.

In the case of State ex rel Shannon County v. Hawkins, et al., 70 S.W. 119, 169 Mo. 615, the question before the court was whether the collector was entitled to a commission on collections for back taxes in addition to the general commissions as set forth in the predecessor of Section 52.260; Section 9260 Rev. St. 1899, which read in part as follows:

"The collector shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

* * *

"xii. In all counties or cities wherein the total amount of all such taxes and licenses levied for any one year exceeds one million dollars, the collector of revenue shall receive, collect and retain, as full compensation for his services for collecting all revenue and other dues which he is authorized to collect, belonging to the state, school, county and city, the following commissions, viz: on current and tax revenues as follows: on all such tax bills placed in his hands, one-half of one percent commission; on all sums collected over eighty percent and up to and including ninety-five percent one percent commission; on all sums collected over ninety-five percent two percent commission. . . . On all back taxes and all other delinquent taxes he shall be allowed a commission of two percent which shall be added to the face of the tax bill and collected from the party paying such tax as a penalty, in the same manner as other penalties are collected and enforced." (Emphasis added).

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A contention was made that Section 9260, Rev. St. 1899, excluded back taxes altogether from its provisions. The court ruled to the contrary and held that, under said section, a collector was entitled to compensation for collecting back taxes to be deducted from the taxes collected, and further compensation under Section 9309; the predecessor to Section 52.290, for collecting said taxes to be taxed against the delinquent tax payer as penalty and cost.

Based on the holding in the Hawkins case, supra, an argument could be made that back taxes for prior years would be included in the phrase "tax bills placed in his hands". However, in Senate Bill No. 62 of the Seventieth General Assembly which became effective on October 13, 1959, substantial changes were made in Section 52.260, RSMo. With the omitted matter enclosed in brackets, the new legislation reads in part as follows:

"The collector in counties not having township organization shall collect and retain [receive as full compensation for his services in collecting the revenue except back taxes] the following commissions [and no more] for collecting [the revenue] all [the whole] state, county, bridge, road, school and all other local taxes, including merchants', manufacturers' and [dram shop] liquor and beer licenses, other than back delinquent and ditch and levy taxes, and the commissions constitute his compensation except in counties where the collector is paid [by law] a salary in lieu of fees: [and other compensation]

* * *

(14) In all counties wherein the total amount [of all such taxes and licenses] levied for any one year exceeds two million dollars, the collector of revenue shall receive, collect and retain [as full compensation for his services] for collecting all revenues and other dues which he is authorized to collect belonging to the state, school and county [and city] the following commissions, viz: [on current and tax revenues, as follows:]

* * *

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"On all sums up to and including eighty percent of the total amount of [such] the tax bills placed in his hands, one-half of one percent commission; on all sums collected over eighty percent and up to and including ninety-five percent, one percent commission; on all sums collected over ninety-five percent, two percent commission;

* * *

"[On all back taxes and all other delinquent taxes, he shall be allowed a commission of two percent which shall be added to the face of the tax bill and collected from the party paying such tax as a penalty in the same manner as other penalties are collected and enforced; which commission the collector shall be entitled to retain as compensation for additional services rendered in collecting delinquent taxes in the amount of said commission shall not be included in computing the maximum salary allowed the collector.]"

It is a rule of statutory construction that the legislature is aware of interpretation placed upon existing statutes and by amending a statute or enacting a new statute on the same subject, the legislature intends to effect some change in the existing law. Wright v. J. A. Tobin Construction Co., 365 S.W.2d 742. As a result of the above statutory changes in Section 52.260, RSMo, it is our view that the legislature was aware of the holding in the Hawkins case, supra, and intended to omit back taxes in providing for the collector's commissions under this section.

We conclude that the phrase "tax bills placed in his hands" does not include back taxes for prior years; however, it is our view that a collector is entitled to a commission for collecting such taxes only in accordance with Section 52.290; and that back taxes are not included in sums collected as set forth in subsection 14(a) of Section 52.260.

CONCLUSION

In regard to determining the rates of commissions of county collectors of third class counties whose offices fall within subsection 14(a) of Section 52.260, RSMo 1969, the opinion of this office is as follows:

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1. The phrase "tax bills placed in his hands" as referred to in subsection 14(a) of Section 52.260, RSMo 1969, does not include back taxes for prior years.

2. A collector is entitled to a commission for collecting back taxes for prior years only in accordance with Section 52.290, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

February 18, 1971

OPINION LETTER NO. 166

Honorable Earl L. Sponsler
State Representative
126th District
R.F.D. 2
Cabool, Missouri 65689



Dear Representative Sponsler:

This opinion is in response to your request in which you ask the following question:

"In a fourth class city, after the office of elected marshal has been abolished by ordinance enacted pursuant to a vote of the people under provisions of Section 79.050 RSMo., can the proposition to establish the office of elected marshal be forced to a vote of the voters by initiative petition?"

Section 79.050, RSMo 1969, provides:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal

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by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified."

In our Opinion Letter No. 100, dated December 1, 1961, issued to the Honorable Robert Young, copy enclosed, we held that the referendum provision of the Missouri Constitution, Section 49 of Article III, applies only to referendum on laws passed by the General Assembly and does not provide for referendum on municipal ordinances. It likewise follows that the constitutional provision is not a constitutional grant to the voters of municipalities to propose ordinances by initiative. The legislature has in various instances, which we will not enumerate here, authorized the use of the initiative process by the voters in municipalities. We find no such express authorization with respect to the instant situation.

We conclude that there is no rule or express statutory or constitutional authority which would authorize the use of the initiative process in this case. In the absence of such authority, there is no right to the initiative process. 5 McQuillin, Mun. Corp. (3rd Ed.), p. 201.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion Letter No. 100,
Young, 12/1/61

GENERAL ASSEMBLY:
REORGANIZATION PLANS:
CONSTITUTIONAL LAW:
GOVERNOR:

1. Reorganization Plan No. 1 of 1971 providing for a Board of Environmental Control does not exceed the authority conferred by Section 26.540, RSMo 1969.

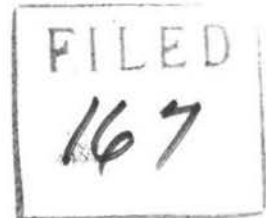
2. Reorganization Plans Numbers 2, 3 and 4 of 1971, placing the employees of

certain agencies under the merit system, involve "changing the organization" of state agencies within the meaning of Section 26.540, RSMo 1969, as provided by such section. 3. Sections 26.500 to 26.540, inclusive, RSMo 1969, empower the Governor to remove from the merit system personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization. 4. Section 26.530, RSMo 1969, does not constitute an unconstitutional delegation of legislative power to the executive branch. 5. The Governor may comply with the provisions of Section 26.530, RSMo 1969, in submitting a reorganization plan to the legislature by delivering such plan to the secretary of the senate and the chief clerk of the house during a regular session of the legislature.

March 1, 1971

OPINION NO. 167

Honorable J. F. Patterson
President pro tem
Honorable William J. Cason
Majority Floor Leader
Honorable A. Clifford Jones
Minority Floor Leader
Missouri Senate
Jefferson City, Missouri 65101



Gentlemen:

This official opinion is issued pursuant to the request contained in your letter concerning the legality of Reorganization Plans Numbers 1 to 4, inclusive, transmitted to each house of the General Assembly of Missouri by the Governor in 1971.

More specifically, the questions raised by your letter are as follows:

"1. Does the creation of a new Board of Environmental Control under Reorganization Plan No. 1 of 1971 and the transfer to it of func-

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tions, powers and duties vested by law in certain existing state agencies exceed the authority conferred by Section 26.540, RSMo 1969, that 'Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of state government or to changing the organization thereof or the assignment of functions thereto'?

"2. Can Reorganization Plans Nos. 2, 3 and 4 of 1971, placing the employees of certain state agencies under the merit system be construed as coming within the purview of 'changing the organization' of a state agency as provided in this same section?

"3. Do Sections 26.500 to 26.540, RSMo 1969, empower the governor to remove employees from the merit system (other than those in the system pursuant to the provisions of the state constitution) or can he, under these statutes, submit a subsequent plan removing from it those employees placed under the merit system by a prior reorganization plan?

"4. Is the provision of Section 26.530, RSMo 1969, that 'A reorganization plan not disapproved by one or the other house of the legislature.....shall be considered for all purposes as the equivalent in force, effect and intent of a public act of the state upon its taking effect by executive order.....' a delegation of the legislative power and hence invalid?

"5. Is the provision of this same section that the 'governor may submit to both houses' satisfied by a delivery of the reorganization plan to the secretary of the senate and the chief clerk of the house, or is a delivery to the senate and house when in session required?"

Response to the questions will be made in the order in which they have been presented.

1. Reorganization Plan No. 1 of 1971 in pertinent part provides as follows:

"Section 1. There is hereby established a Board of Environmental Protection consisting of seven members who shall be selected for their knowledge of ecology, air and water pollution control, wild-

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life, parks and recreation and similar fields which are concerned with environmental quality. The members of the Board shall be appointed by the Governor with the advice and consent of the Senate for a term of four years. Of the members first appointed two shall be appointed for a term of two years, two for a term of three years and three for a term of four years. Members may be removed only for good cause. If a vacancy occurs, the Governor shall fill the vacancy for the unexpired term. The members shall serve without compensation, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties. The Governor shall nominate the chairman.

"Section 2. All of the functions, powers and duties vested by law in (1) the air conservation commission of the state of Missouri under chapter 203, RSMo, 1969, (2) the water pollution board under chapter 204, RSMo, 1969, (3) the water resources board, under sections 256.180-256.260, RSMo, 1969, (4) the division of health insofar as such functions relate to the disposal of solid waste material, are hereby transferred to the Board of Environmental Protection.

"Section 3. The existing agencies shall continue to perform administrative and staff functions as heretofore."

Statutory authority for submission of plans for reorganization of agencies of the executive department by the Governor is contained in Sections 26.500 to 26.540, inclusive, RSMo 1969.

Section 26.500 provides, in part, as follows:

"Within the first thirty days of any regular legislative session, the governor may submit to both houses of the legislature, at the same time, one or more formal and specific plans for the reorganization of executive agencies of state government."

Section 26.540 provides:

"Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of the state government or to changing the organization thereof or the assignment of functions thereto. Each plan

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shall contain such provisions as are necessary to assure the uninterrupted conduct of the governmental services and functions affected by the proposed reorganization plan."

The effect of Section 2 of Reorganization Plan No. 1 is to consolidate the functions, powers and duties of four administrative agencies of the state dealing with environmental control in a Board of Environmental Protection for the express purposes of more efficient operation of the government of the state and promotion of uniform policies and procedures in the various agencies of the state which deal with environmental pollution.

Among other things, the law expressly provides that a plan may relate to the combination of agencies or change the organization thereof (Section 26.540, RSMo 1969). Where such a combination or consolidation takes place, it would be ineffective, as a practical matter, unless an entity be established or found with which the combined agencies can be identified and within which they can operate. The Board of Environmental Protection affords the framework for proper functioning of the combined or consolidated agencies and is necessary to assure the uninterrupted conduct of their business as required by Section 26.540. The functions, powers and duties of the combined agencies are not changed and no new functions, powers or duties are established or created. In construing a similar provision of a New Hampshire reorganization statute, the Supreme Court of that state in Opinion of the Justices, 96 N.H.517, 83 A.2d 738,744,745, said:

"The Governor has no power whatsoever under the act to create entirely new agencies or functions without regard to those existing. He must deal with the existing framework of the executive department and the activities now authorized.

*

*

*

"So, the power to provide for the appointment, term of office and compensation of the heads and assistant heads of agencies is limited to carrying out the purposes of the act. Such power exists only where action under the statute makes it reasonably necessary. It is not a general power but incidental and subordinate to the provisions of the act. It is made necessary because of the fact that the duties and responsibilities of the heads and assistant heads may be quite different under the reorganization. * * *"
(Emphasis supplied)

It is our opinion that the designation of an agency within which the combined agencies can function is a necessary implication of the

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right to combine and change the organization thereof and that Reorganization Plan No. 1 does not exceed the legal empowerment of Section 26.540, RSMo 1969.

2. Reorganization Plans Numbers 2, 3 and 4 of 1971 provide for selection or employment in accordance with and subject to the State Merit System Law of employees of the Public Service Commission, the Department of Liquor Control, and certain employees of the office of the State Purchasing Agent respectively.

The State Merit System Law is contained in Chapter 36, RSMo 1969, and by the terms of Section 36.030, its provisions apply to the State Department of Public Health and Welfare, the Department of Corrections, the personnel division of the Department of Business and Administration, and the Division of Employment Security of the Department of Labor and Industrial Relations. No provision is made in the law for including thereunder employees of other departments or agencies of the state government.

The apparent effect of placing personnel covered by Reorganization Plans Numbers 2, 3 and 4, under the merit system law is to substitute the standards of employment, term of service, retirement and separation from service established by the merit system law for the system currently in use by such agencies. This is a change in the organization of these agencies. The plan deals with the terms of employment of personnel of these certain agencies and amounts to an assignment of certain functions theretofore performed by each affected agency respecting methods of hiring and firing, wage and salary scales, promotion, retirement and similar matters to those established by the merit system. In substance this is an assignment of a function as well as changing the organization of the agencies in question within the meaning of Section 26.540.

3. As we understand the third question presented, you have requested our opinion as to (1) whether Section 26.500 to Section 26.540, RSMo 1969, empower the Governor by a plan of reorganization to remove from the merit system employees who are subject to the system by virtue of prior legislation and (2) whether, under this statute, he may lawfully submit a subsequent plan removing from the merit system employees placed thereunder by a prior reorganization plan.

Based upon the considerations set forth in the discussion concerning Question 2 heretofore set forth, it is our view that the Governor may remove from the State Merit System personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization. Such removal would be accomplished by virtue of the plan becoming effective in the manner provided by the reorganization statute.

4. There are certain well established principles which must be observed in considering whether Section 26.530, RSMo 1969, is an un-

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constitutional delegation of legislative power. These are that the supreme legislative power of the state is vested in the General Assembly; the provisions of our state constitution are not a grant but a limitation of legislative power so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions; a statute will, if possible, be construed so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution. Missouri Constitution, Article III, Section 1; State ex rel. Jones v. Atterbury, 300 S.W. 2d 806 (Mo.Banc 1957); State ex rel. Holekamp v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo.Banc 1960), app.dism.316 U.S.715; State ex rel. Hughes v. Southwestern Bell Telephone Co., 179 S.W.2d 77 (Mo.S.Ct. 1944); Kansas City v. Fishman, 241 S.W.2d 377 (Mo.S.Ct.1951); State ex rel. Missouri Southern R.Co., v. Public Service Commission, 168 S.W.1156,1164 (Mo.S.Ct.1914); Birmingham Drainage Dist. v. Chicago B.&Q.R.Co., 202 S.W.404,409 (Mo.S.Ct.1918); State ex rel. Eagleton v. McQueen, 378 S.W.2d 449 (Mo.Banc 1964); Williams Lumber & Mfg. Co. v. Ginsburg, 146 S.W.2d 604 (Mo.S.Ct.1940).

It is recognized that while the legislature cannot delegate its power to make law, it may empower boards and commissions to make rules and regulations for administering the law and may vest them with discretionary powers. If the law itself is full and complete as it comes from the lawmaking body, it may be and frequently must be left to agents in one form or another to perform acts of executive administration which are in no sense legislative. Port Royal Mining Co. v. Hagood, 30 S.C.519,524,525, 9 S.E.686,3 L.R.A.841. In its opinion the court said:

" * * * The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The General Assembly in large measure patterned its reorganization statute upon the Act of Congress then in effect providing for reorganization of the executive agencies of the federal government with the Governor designated to make the studies and perform the reorganizational functions which the congressional legislation provided should be done by the President. Under the circumstances it is pertinent to discuss generally the validity of reorganizational powers vested in the chief executive by the legislative branch of government. In 1 Am.Jur.2d, Administrative Law, Section 25, the following statement

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is made:

" * * * The powers of departments, boards, and administrative agencies are subject to expansion, contraction, or abolition at the will of the legislative and executive branches of the government. * * *

"Congress has at various times vested power in the President to reorganize executive agencies and redistribute functions, and particular transfers under such statutes have been held to be within the authority of the President. Any doubt as to the authority of the President under power given him by Congress to transfer the functions of one agency to another by executive order and the question of the compliance with the conditions of the exercise of such authority, and the validity of the performance of those functions by the transferee, is determined by congressional approval and ratification in subsequently recognizing the validity of the transfer by making appropriations for the purposes of carrying out the transferred functions."

In the case of *Isbrandtsen-Moller Co., Inc., v. United States*, 14 F.Supp.407, 57 S.Ct.407, 300 U.S.139, 81 L.Ed.565, the Supreme Court upheld the validity of the Executive Department's Reorganization Act. The court held that Congress had the power to authorize the President to abolish boards and transfer their functions and acts under the Reorganization Act, where Congress subsequently adopted the construction given the act by permitting the reorganization order of the President to become effective and by making appropriations for the department to which the duties were transferred. The court further held that a Presidential order abolishing a board was not invalid on the ground that the President acted without adequate hearings and findings where the order of transfer stated he had investigated, and the absence of any showing to the contrary. See also 73 C.J.S., *Public Administrative Bodies and Procedure*, Section 23.

Although reference is made to the federal reorganization plan, the following comment found in 48 *Columbia Law Review* 1221 to 1224, inclusive, is pertinent to the present inquiry:

" * * * In recent years there has been increased appreciation of the necessity for permitting Congress to designate another body to fill in the details of its legislative policy and the courts have found the standards in legislation involving delegation to be adequate. * * * Indeed, it is questionable whether the courts today would even

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subject the standards in reorganization legislation to severe scrutiny. * * *
Where, as here, the Government is directing its action inward, toward its own structure and procedure, there is less need for clearly defined standards."

What the Missouri statute plainly seeks to accomplish is delegation to the Governor of the power to reorganize the departments and agencies of the executive branch of the government for the purpose of promoting efficiency and economy in that branch. The delegation of subsidiary legislative power to the executive is nothing new. We observe this type of delegation in connection with numerous executive and administrative agencies operating in this state and, as we have seen, the same kind of delegation to the chief executive to reorganize that branch of the government in furtherance of efficiency and economy that is granted in our reorganization statute has been upheld in the federal courts. *Isbrandtsen-Moller Co., Inc., v. United States*, supra, l.c. 412 [8]. In the opinion of this case it is said:

" * * * The result (of power granted to the President in furtherance of efficiency and economy) was to abolish a board whose existence was dependent upon the will of Congress and to delegate to the Department of Commerce the same powers and duties the board had possessed. This seems in accord with correct standards as to delegation of authority to act within proper limits prescribed by Congress. * * * "

The conclusion reached in this case was approved in *Swayne & Hoyt v. United States*, D.C., 18 F.Supp.25.

In *Ferretti v. Jackson*, 88 N.H.296,299, 188 A.474,477, the court said:

" * * * the Constitution permits the Legislature to empower the executive department to enact legislation of a subordinate nature to a general law to meet the necessities of government. 'The supreme legislative power' (Const. pt.2,art.2) is vested in the Legislature, but not the sole and exclusive power in respect to incidental and subsidiary legislation. * * * " l.c.477

In *American Power & Light Company v. Securities and Exchange Commission*, 329 U.S.90, 56 S.Ct.133,142,91 L.Ed.103, the court declares the constitutional requirements as follows:

" * * * Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it

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then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. * * * " 1.c.105

In Opinion of the Justices, supra, it was said:

" That there is need of some body other than the Legislature to deal with this broad and complex subject of reorganization of the executive part of the government that requires so much time detailed work and expert knowledge and that involves so many diverse and conflicting interests, may well have prompted the enactment of the measure.
* * * " 1.c.743

Furthermore, we think it is important that the Reorganization Plans submitted by the Governor and the Executive Reorganization statute itself do not deal with private rights or personal liberties but with the structure and functions of that branch of the state government of which the Governor is head. Under these circumstances the statute may have wider latitude than otherwise would be the case. (See Opinion of the Justices, supra, page 745). In U. S. v. General Petroleum Corp., D. C., 73 F.Supp. 225,250, the court said:

"The authorities which the defendants cite upon the question of requisite standards in statutes are those involving action by the government in its sovereign capacity, that is, where it reaches out to deal with, direct, or regulate the conduct of the citizen; in some instances against the will of the citizen, and often in interference with the citizen's own property or contract rights. * * * There the law requires strict boundaries to be erected by the statute around the exercise of power by official or board to whom is surrendered so much of the Congressional power as is necessary to fill in the details of the statute enacted. * * * "

Reorganization plans must be submitted to the legislature within the first thirty days of any regular legislative session and cannot become effective until ninety days after the final adjournment of the session of the legislature and then only if there has not been a disapproval by a senate or house resolution adopted within sixty days of the time the plan was submitted. We do not believe that this provision was intended by the legislature as an enactment into law of the proposed plan. It is merely one of the checks or restraints upon the exercise of the subordinate legislative power delegated to the

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Governor. Therefore, Section 21 et seq., Article III of the Missouri Constitution relating to legislative proceedings in the enactment of laws have no application. These provisions relate to the supreme legislative power when used for the passage of statutes as for example in the enactment of Sections 26.500 to 26.540, RSMo 1969, being the statute here under consideration.

Based upon the foregoing considerations, it is our opinion that Section 26.530, RSMo 1969, is not an unlawful delegation of legislative power to the executive branch.

5. It is assumed that the fifth question presented in your request makes reference to Section 26.500, RSMo 1969. This section, repeated for convenience, reads as follows:

"Within the first thirty days of any regular legislative session, the governor may submit to both houses of the legislature, at the same time, one or more formal and specific plans for the reorganization of executive agencies of state government."

Sessions of the legislature are fixed by Article III, Section 20, and Section 20(a) of the Constitution of Missouri where it is provided that:

"The general assembly shall meet on the first Wednesday after the first Monday in January following each general election. * * *

"The general assembly shall reconvene on the first Wednesday after the first Monday of January in even-numbered years after adjournment at midnight on June thirtieth of the preceding odd-numbered years. A majority of the elected members of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, * * *" Art. III, Sec. 20.

"The general assembly shall adjourn at midnight on June thirtieth in odd-numbered years until the first Wednesday after the first Monday of January of the following year, unless it has adjourned prior thereto. * * * The general assembly shall automatically stand adjourned sine die at midnight on May fifteenth in even-numbered years, unless it has adjourned sine die prior thereto. * * * " Art. III, Sec. 20(a)

It is apparent that regular sessions of the General Assembly begin on the first Wednesday after the first Monday of January and the

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legislature continues in session until adjournment by action of the legislature itself or by virtue of the constitutional provision quoted above. Thus, the general session of the legislature continues from the time it is convened in January until it adjourns, ordinarily June 30 in odd-numbered years and May 15 in even-numbered years.

The Constitution provides the manner for returning bills by the Governor to the legislature when it is adjourned or in recess for more than thirty days, stating that he may return bills to the Secretary of State in this case. (Article III, Section 31). In cases where there is an adjournment or recess for more than fifteen but less than thirty days, Section 21.270, RSMo 1969, states that such bills may be returned to the office of secretary of the senate or the office of the chief clerk of the house, as the case may be. There appears to be nothing in the Constitution or statutes requiring the Governor to deliver bills or other documents, including plans for reorganization, to the assembled members of each house or to the presiding officer thereof.

The Constitution recognizes the fact that there is a difference between calendar days of a general session of the legislature and legislative days of such a session. Article III, Section 25, places a limitation on introduction of bills providing that no bill other than an appropriation bill shall be introduced in either house after the sixtieth legislative day of any odd-year session or after the thirtieth legislative day of any even-year session.

It will be observed that Section 26.500, RSMo, does not use the term "legislative day." On the contrary it states, "Within the first thirty days of any regular legislative session,".

It is recognized also that while the legislature may be in session at any given time, it does not necessarily mean that either or both houses of the legislature are meeting to do business with a quorum present. In practice each house meets according to its own dictates and calendar within the bounds provided by the Constitution, the law and its own rules of order. The reorganization statute requires that the Governor submit plans for reorganization to both houses of the legislature at the same time. As a practical matter it might be difficult for the Governor to present the plans within the time allowed if it were necessary that both houses be then meeting and conducting business.

It is our view that this statute should be interpreted to mean that the Governor may submit reorganization plans to both houses of the legislature within thirty calendar days from the beginning of any regular legislative session and that submission by delivery to the secretary of the senate and to the chief clerk of the house satisfies the requirements of law. To reach the opposite conclusion would conceivably result in the Governor's inability to submit plans of reorganization at all.

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CONCLUSION

It is the opinion of this office that:

1. Reorganization Plan No. 1 of 1971 providing for a Board of Environmental Control does not exceed the authority conferred by Section 26.540, RSMo 1969.
2. Reorganization Plans Numbers 2, 3 and 4 of 1971, placing the employees of certain agencies under the merit system, involve "changing the organization" of state agencies within the meaning of Section 26.540, RSMo 1969, as provided by such section.
3. Sections 26.500 to 26.540, inclusive, RSMo 1969, empower the Governor to remove from the merit system personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization.
4. Section 26.530, RSMo 1969, does not constitute an unconstitutional delegation of legislative power to the executive branch.
5. The Governor may comply with the provisions of Section 26.530, RSMo 1969, in submitting a reorganization plan to the legislature by delivering such plan to the secretary of the senate and the chief clerk of the house during a regular session of the legislature.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

March 16, 1971

OPINION LETTER NO. 168

Answer by Letter (Wieler)

Honorable James N. Foley
Prosecuting Attorney
Macon County, Courthouse
Macon, Missouri 63552



Dear Mr. Foley:

This is in response to your request for an opinion concerning the propriety of a director of a nursing home district, organized under Section 198.200, RSMo 1969, accepting employment and compensation as a licensed practical nurse in the same nursing home district.

Section 190.290, RSMo 1969, places the power to exercise all legislative and executive functions in a nursing home district with the board of directors. Included among these is the power to employ whatever help necessary for the proper maintenance of the nursing home. See Section 198.300(6), RSMo 1969.

It is our opinion, as a matter of public policy, that a director of a nursing home district cannot accept employment and compensation as a licensed practical nurse within that district. To do so would be to create a substantial conflict between his interests as director of the district, charged with exercising all of the legislative and executive powers of such district as a member of the board of directors thereof, and his private interests as an employee.

Enclosed is a copy of Opinion No. 465, issued December 29, 1966, to Lee E. Norbury, which contains a comprehensive discussion of the public policy reason for not allowing a public official to contract with himself.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 7, 1971

OPINION LETTER NO. 169

Answered by Klaffenbach



Honorable Jack E. Gant
Senator, 16th District
Room 430, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Gant:

This letter is in answer to your opinion request in which you pose the following questions:

"The Sheriff of Jackson County, Missouri, operates a County Highway Patrol under the provisions of Sections 57.570 through 57.600, inclusive, RSMo 1969. All expenses for the operation of the Patrol are paid out of the County Road and Bridge Fund.

"The Sheriff is having the following duties performed by the Jackson County Highway Patrol:

"a. Road patrol assists the police departments of incorporated cities in Jackson County with their calls and investigations.

"b. Patrols roads and streets in incorporated cities in Jackson County.

"c. Contracts with incorporated cities to perform patrol services on streets and roads within incorporated limits of the city and turns funds from said contracts to the Jackson County Treasurer for the General Fund, rather than Road and Bridge Account.

"d. Operate a narcotics squad in both the incorporated and unincorporated areas. (sic.)

"e. Provides a Junior Deputy Program for youth, which is serviced by Highway Patrolmen in both incorporated and unincorporated areas.

Honorable Jack E. Gant

"f. Serves criminal warrants and makes arrests in both incorporated and unincorporated areas.

"g. Assists the County Coroner in investigations, in both incorporated and unincorporated areas.

"h. Operates an arson squad, in both incorporated and unincorporated areas.

"i. Uses Highway Patrolmen and patrol vehicles to transport prisoners between the County Jail and various courts in Jackson County and also to the State penitentiary in Jefferson City, Missouri.

"j. Patrols roads in the unincorporated areas in Jackson County.

"In addition to the above, the Sheriff in 1970 transferred \$90,500.00 from Highway Patrol Accounts to a Capital Outlay Account and with these funds has constructed an addition to the Patrol Headquarters building to house the Arson and Narcotics Division of the Patrol.

"I hereby request an opinion from your office as to which of the above designated services and actions of the Sheriff in connection with the operation of the Highway Patrol of Jackson County are authorized and which are not authorized under the provisions of the applicable statutes of Missouri."

Sections 57.570, RSMo 1969 to 57.600, RSMo 1969, pertain to the Jackson County Highway Patrol.

Section 57.570 provides:

"The sheriff in all counties of class one now or hereafter having more than five hundred thousand inhabitants and not having a charter form of government, with the approval of the county court, may create a force consisting of a superintendent and other officers, sergeants, patrolmen and radio personnel to be known as the county highway patrol. The sheriff shall prescribe rules for instruction and discipline, make all administrative rules and regulations and fix the hours of duty for members of the patrol."

Section 57.580 provides:

"The county highway patrol shall police the highways constructed and maintained by the county and enforce all laws designed to protect and safeguard such highways. The patrol shall protect employees of the county when engaged in maintenance and construction work and shall notify the county highway department of any dangerous condition existing on county highways."

Section 57.590 provides:

"The county court shall provide suitable offices for the sheriff to use for highway patrol purposes which shall be open at all times and be in charge of the sheriff. The sheriff, with the approval of the county court, shall employ the clerical force, radio operators, and other subordinates, and shall provide the office equipment, stationery, postage, supplies, telegraph and telephone facilities as he shall deem necessary. The county highway patrol radio network shall be under the control of and at the service of the sheriff for the regular and emergency bulletins and service the sheriff may require from time to time and shall cooperate with other law enforcement agencies."

Section 57.600 provides:

"All salaries and expenses of members of the patrol and all expenditures for vehicles, equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol in the protection of roads and bridges maintained and constructed from the county road and bridge funds, in the regulation of traffic on highways maintained and constructed by the county shall be paid monthly by the county treasurer out of county road and bridge funds at the end of each month by warrant drawn by the county court upon the county treasury."

Further, Section 12 (a) of Article X of the Missouri Constitution provides:

"In addition to the rates authorized in section 11 for the county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the

proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law." (Emphasis Added)

Section 137.555, RSMo 1969, which implements the provisions of Section 12 (a) of Article X of the Missouri Constitution, provides specifically that the special road and bridge fund can be used for road and bridge purposes and for no other purposes whatever.

As we have noted from the provisions relative to the Jackson County Highway Patrol the duties of such patrol under Section 57.580 are to "police the highways constructed and maintained by the county and enforce all laws designed to protect and safeguard such highways". The patrol is further authorized and required "to protect employees of the county when engaged in maintenance and construction work" and to "notify the county highway department of any dangerous condition existing on county highways".

Likewise, as we noted under Section 57.590 the sheriff with the approval of the county court, "shall employ the clerical force, radio operators, and other subordinates, and shall provide the office equipment, stationery, postage, supplies, telegraph and telephone facilities as he shall deem necessary". The county highway patrol radio network "is under the control of and at the service of the sheriff for the regular and emergency bulletins and service the sheriff may require from time to time and shall cooperate with other law enforcement agencies".

Notably Section 57.600 which we have quoted above and will not repeat here, provides that certain designated expenditures will be paid out of the county road and bridge funds.

It is our view, that under the constitutional provision which we have quoted, Section 12 (a) of Article X, and under Section

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57.580 the county highway patrol has power only to police the highways constructed and maintained by the county and to enforce all laws designed to protect and safeguard such highways and highway maintenance employees and we find no authority to use any road and bridge funds for general sheriff's police functions. Because of the limitations placed upon the use of such funds we believe that the operations of the county highway patrol financed by such funds are very limited.

Therefore, in answer to your questions "a" through "i" to the extent that such functions bear no relationship to policing such county roads, they are not proper subjects of expenditure of road and bridge funds.

We wish to point out that we have not been advised as to whether or not Jackson County has established a county urban road system under the provisions of Section 137.557, RSMo 1969. Under such a system the county court may designate any road within the county a part of the system without regard to city or road district boundaries and the county establishing such a system and any city within such a county may contract for the construction, reconstruction, repair and maintenance of the roads within the system, but all other service not specifically contracted for relating to such roads are to be performed by the city within which they are located. If such a county-urban road system has been adopted, then the county highway patrol, would have authority to patrol the roads within such a system constructed and maintained by the county.

We are also of the view, in answer to your question paragraph "j" that the patrol has express authority to patrol highways constructed and maintained by the county in unincorporated areas of the county but not roads which are not roads constructed and maintained by the county.

In answer to your final question with respect to the transfer of funds by the sheriff from the highway patrol accounts to a "Capital Outlay Account" for the construction of an addition to the Patrol Headquarters building to house an Arson and Narcotics Division, it is our view that road and bridge funds could not be used for such a purpose as there is no realistic relationship between the maintenance of the county highways and an Arson and Narcotics Division of the patrol.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
COMPENSATION:
CONSTITUTIONAL LAW:

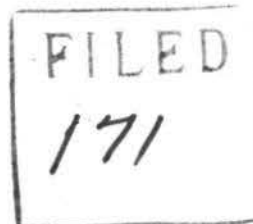
In school districts in which a school board is authorized by Section 168.191, RSMo 1969, to enter into a contract with a superintendent

of schools for the school district for a period of not to exceed three years, Section 38(a) of Article III, and Section 39(3) of Article III, Missouri Constitution, prohibit such school board and the superintendent from terminating a partially performed three year contract and executing a new three year contract providing for the performance of the same duties at a greater compensation when the only reason for so doing is to increase the superintendent's compensation before the expiration of the current contract.

OPINION NO. 171

May 4, 1971

Honorable Donald J. Gralike
Representative, District 49
Room 301, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Gralike:

This official opinion is issued in response to your request for a ruling on the following question:

"On May 6, 1970 you issued opinion No. 211 which states in conclusion that additional school monies received by a school district may not be legally paid by the district to teachers already under contract.

"In St. Louis County many school superintendents are under three year contract. It is common practice for superintendents to resign before the expiration of the three year contract and be reappointed to this position by the school board with a salary increase for a new three year period.

"Due to the fact that you have held this procedure improper for teachers, it would appear that the method being followed by the school superintendents would also be in violation."

The implicit assumption underlying the factual situation presented by your opinion request is that the only reason for terminating a superintendent's current three year contract before its term expires and executing a new contract for another three year period is to increase the superintendent's compensation before the

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expiration of the current contract. With the exception of the greater compensation, we understand, and will assume for the purposes of this opinion, that all other terms and conditions in the new contract are the same as in the terminated agreement.

Section 168.191, RSMo 1969, governing the employment of a school superintendent in a first class county provides in part as follows:

"In all counties of the first class, any school board, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years. . . ."

Article III, Section 38(a), Constitution of Missouri of 1945, provides in part as follows:

"The general assembly shall have no power to grant public money or property, . . . to any private person, . . . excepting aid in public calamity, . . ."

As a school board derives its powers from the General Assembly, and can have no greater power than the General Assembly, Article III, Section 38(a) is also a limitation upon the authority of a school board. Kizior v. City of St. Joseph, 329 S.W.2d 605, 609 (Mo. 1959).

In the present case, the school board proposes to increase the superintendent's compensation, without altering the nature of his obligation, by terminating a partially performed contract and executing a new contract providing for a greater rate of compensation. This is but an indirect way of increasing the superintendent's compensation for the remainder of the partially performed contract, and has the same effect as would a direct payment of extra compensation during the term of such contract. We believe this arrangement amounts to a "grant of public money" to a private person in violation of Article III, Section 38(a).

Relying in part on the predecessor to Article III, Section 38 (a), this office previously determined that a school district may not pay a bonus to a teacher at the end of the year when said bonus is not provided by contract (Opinion No. 16, dated April 23, 1938).

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Also, a school board may not make a monetary donation or gift to a school teacher or superintendent during the term of contract (Opinion No. 21, May 10, 1939). In Opinion No. 211, dated May 6, 1970, we concluded that Article III, Section 38 (a) prohibited a school board from increasing a teacher's compensation during the term of contract either by making a direct payment to the teacher during the term of the contract, or by terminating the contract and entering into a new contract for the same year providing for the same terms and conditions but at additional compensation.

In comparing the instant factual situation with the factual situation in Opinion No. 211, the only potentially meaningful distinction is that here the school board proposes to terminate a current contract and enter into a new contract for a subsequent three year period whereas in Opinion No. 211 the school board proposed to execute a new contract for only the remainder of the term of the partially performed contract. This distinction does not furnish a basis for distinguishing the instant situation from that presented in Opinion No. 211 because we are assuming that the terms and conditions of the new three year contract are the same as the partially performed contract except for higher compensation. Therefore, for the period of time left in the old contract, which is included in the new contract, the school board by increasing the superintendent's compensation has granted public money to a private individual in violation of Section 38(a).

In State ex rel. Wander v. Kimmel, 256 Mo. 611, 165 S.W. 1067 (1914), the Supreme Court of Missouri held that a statute which denied witness fees to policemen who testified in certain cases but contained an exception which allowed a policeman who was a member of a police relief association to collect witness fees for the use and benefit of the association was unconstitutional. The money so collected was used by the association to pay pensions and other benefits to its members. In construing the predecessor of Article III, Section 38(a), the court stated that:

"Moreover, as judicial construction is not a thing that may ride without bits or reins, it is a fundamental proposition to be accepted as a sound rule of exposition that what is forbidden to be done in a straight line may not be done in a crooked line. What is forbidden to be done directly may not be done indirectly or obliquely. If, then, the effect of the legislation in question is to create a pension fund out of the common chest and thereby grant pensions out of public funds to policemen . . . the statutes questioned

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cannot be held a constitutional exercise of legislative power in that regard." Id. at 1072.

In State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666, (Mo. banc 1966), the Supreme Court of Missouri noted that:

"The Constitution in general is subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the Constitution as a charter of popular government, . . ." Id. at 669.

One such rule of construction provides that:

"The legislative act should be given such construction as to suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and for private gain, and to add force and life to the cure and remedy, for the public good. . . ." State v. Schwartzmann Service, Inc., 40 S.W.2d 479, 480 (St.L.Ct. App. 1931)

Consistent with these principles we believe that in the present case a school board cannot circumvent the limitation of Article III, Section 38(a) by increasing a superintendent's compensation under a partially performed contract in the indirect fashion proposed.

Furthermore, we believe that the proposed arrangement to increase a superintendent's compensation is prohibited by Article III, Section 39(3), Constitution of Missouri of 1945, which reads in part as follows:

"The general assembly shall not have power:

* * *

"(3) To grant or authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

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In Opinion No. 211 we determined that a school district was a "municipal authority" within the meaning of Article III, Section 39(3), and that a school board was, therefore, prohibited from increasing the compensation of one of its teachers by terminating a current contract before expiration and entering into a new contract for the same year providing for greater compensation. In the instant case, terminating an existing three year contract and entering into a new three year contract with the same terms and conditions and requiring performance of the same duties is an attempt to accomplish indirectly what could not be accomplished directly--increasing the superintendent's compensation during the term of the contract. We believe such a scheme violates Section 39(3) of Article III.

In Kizior v. City of St. Joseph, *supra*, the city had entered into an exclusive contract with a private corporation for the collection of garbage for a ten year period at a specified annual fee. After partial performance the contractor complained that the contract had become unprofitable and an attempt was made to increase the compensation paid by the city without changing the contractor's obligation. In holding that the increase in compensation was unlawful, the Supreme Court of Missouri described the purpose underlying Article III, Section 39(3), as follows:

" . . . Certainly the fact that appellant may have entered into an improvident contract would afford no basis for creating an exception to the application of a clear constitutional prohibition. Section 39(3), Article III was adopted by the people as a safeguard against the squandering of public money and to prohibit public officers from giving gratuities to contractors, and it may not be cast aside even though one who has acted in good faith may suffer hardships. The courts of this state have adhered to a policy of strictly enforcing the constitutional and statutory safeguards applicable to the contract of public corporations. Likes v. City of Rolla, 184 Mo.App. 296, 167 S.W. 645; Webb-Boone Paving Co. v. State Highway Commission, 351 Mo. 922, 173 S.W.2d 580; Donovan v. Kansas City, 352 Mo. 430, 175 S.W.2d 874. . . . " Id. at 610.

Watts v. Levee Dist. No. 1, Mississippi County, Mo., 164 Mo. App. 263, 145 S.W. 129 (St.L.Ct.App. 1912), demonstrates the liberal interpretation courts have given to this constitutional provision in order to fully effectuate its beneficial purpose. In

Honorable Donald J. Gralike

that case, the court, interpreting the predecessor of Article III, Section 39(3), stated that:

" . . . While this constitutional prohibition does not literally cover the class of officers or public agencies to which these drainage districts belong, it would seem that its spirit should cover them, and that spirit is against the allowance or payment for public work, services or labor of any kind done in the first instance without authority of law, as was the case here." Id. at 134.

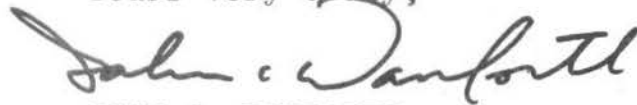
In light of the broad purposes and liberal interpretation of Article III, Section 39(3), a school board cannot evade the restrictions of Section 39(3) by increasing a superintendent's compensation under a partially performed contract in the indirect fashion proposed.

CONCLUSION

It is, therefore, the opinion of this office that in school districts in which a school board is authorized by Section 168.191, RSMo 1969, to enter into a contract with a superintendent of schools for the school district for a period of not to exceed three years, Section 38(a) of Article III, and Section 39(3) of Article III, Missouri Constitution, prohibit such school board and the superintendent from terminating a partially performed three year contract and executing a new three year contract providing for the performance of the same duties at a greater compensation when the only reason for so doing is to increase the superintendent's compensation before the expiration of the current contract.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 211
5-6-70, Belt

Op. No. 21
5-10-39, Dawson

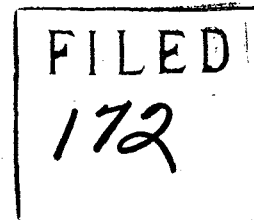
Op. No. 16
4-23-38, Chamier

TAXATION (EXEMPTIONS): Where real estate is conveyed to a non-profit organization, and is inhabited as a residence by the grantor by virtue of a retained life estate, or by other persons by virtue of a lease from the non-profit organization, the real estate is not exempt from taxation under Article X, Section 6 of the Constitution of Missouri and Section 137.100, RSMo 1969. Where the entire fee is subject to taxation, the leasehold is included in the value of the fee, and the lessor is liable for the tax. Where a life estate is retained and the entire fee is taxed, the life tenant has the duty of paying the tax.

May 14, 1971

OPINION NO. 172

The Honorable Henry S. Clapper
Prosecuting Attorney
Lawrence County
Mountain View, Missouri 65548



Dear Mr. Clapper:

This opinion is issued in response to your question whether certain property of the Ozarks Methodist Manor at Marionville, Missouri is taxable, and, if so, who is liable for the tax.

It is our understanding that the Ozarks Methodist Manor is a non-profit organization which operates a nursing home in Lawrence County. It has been the practice for older persons to purchase land and build homes adjacent to the nursing home. These older persons then convey the property they have acquired to the Ozarks Methodist Manor by deed, retaining for themselves life estates in the property conveyed. In consideration for the deed, Ozarks Methodist Manor agrees, by contract, to make nursing home services available to the grantors. The grantors continue to use the property they have conveyed to the Ozarks Methodist Manor as residences for the remainder of their lives. Upon the death of the grantors, the Ozarks Methodist Manor leases this property for consideration to other persons, who also use the property as private residences.

On the basis of the facts you have given us, it is clear that the property in question is taxable under Chapter 137, RSMo 1969. Article X, Section 6 of the Constitution of Missouri strictly limits exemptions from property taxes as follows:

Honorable Henry S. Clapper

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

This constitutional provision is implemented by Section 137.100, RSMo 1969 which provides:

"The following subjects are exempt from taxation for state, county or local purposes:

(1) Lands and other property belonging to this state;

(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;

(3) Nonprofit cemeteries;

(4) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies organized in this state;

(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

Paragraph (5) of Section 137.100 is the only exemption provision applicable to the facts at hand. A reading of this paragraph indicates that a charitable organization will be exempt from property tax only if the property is "actually and regularly used

Honorable Henry S. Clapper

exclusively ... for purposes purely charitable." The property about which you ask is not used exclusively for purely charitable purposes. Instead, it is used for private residence. Therefore, the property cannot be exempt from taxation so long as it is the residence of the life tenant or the residence of a lessee after the life tenant's death. We enclose, for your information, Opinion No. 307 issued to the Honorable John Crow, June 25, 1970, in which we held that real property under construction which, when construction is completed, will be used for purely charitable purposes, is not, during the period of construction, exempt from property taxes.

You next ask who is liable for the payment of taxes assessed pursuant to Chapter 137. Section 137.075 provides:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Section 137.010(2) defines "real property" for the purposes of Chapter 137 as follows:

"'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto;..."

The Supreme Court of Missouri has held repeatedly that a leasehold interest may be separately assessed, and the lessee may be taxed where the lessor is exempt from taxation. State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S.W. 998 (1901); State v. Personnel Housing, Inc., 300 S.W.2d 506 (1957); Iron County v. State Tax Commission 437 S.W.2d 665 (En Banc 1968). However, separate taxation of the leasehold has, as a practical matter, only been applied in cases where the lessor, by virtue of being a governmental entity or otherwise, has been exempt from taxation. As we have previously stated, in the fact situation here presented, the Ozarks Methodist Manor is not exempt from taxation. Therefore, there would be no purpose served in separately assessing the lessor's and the lessee's interests in the property. See, Iron County v. State Tax Commission, supra, at 672 in which the Court stated that where neither the lessor nor the lessee is exempt, "leaseholds ordinarily are taxed by being lumped and included in the value of the fee, where the fee itself is taxable." Therefore, we believe that under the facts stated, where the Ozarks Methodist Manor holds fee interest in the property, and leases that property to another party who uses

Honorable Henry S. Clapper

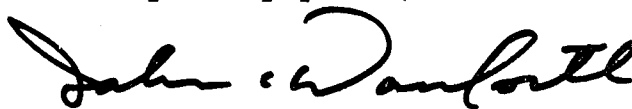
it for residential purposes, the interest of the Ozarks Methodist Manor in the entire fee is taxable.

In the case of a retained life estate in the original grantor, we believe that the same reasoning applied in *Iron County v. State Tax Commission* would be applicable. That is, the interests of the life tenant and the remainderman would be lumped together for the purposes of taxation where neither is exempt. While the property itself is assessed, and the property itself may be sold for non-payment of taxes, the rule in Missouri is that as between life tenants and remaindermen, life tenants have the duty of paying property taxes. See *Duffley v. McCaskey*, 345 Mo. 550, 134 S.W.2d 62 (1939).

CONCLUSION

It is the opinion of this office that where real estate is conveyed to a non-profit organization, and is inhabited as a residence by the grantor by virtue of a retained life estate, or by other persons by virtue of a lease from the non-profit organization, the real estate is not exempt from taxation under Article X, Section 6 of the Constitution of Missouri and Section 137.100, RSMo. 1969. Where the entire fee is subject to taxation, the leasehold is included in the value of the fee, and the lessor is liable for the tax. Where a life estate is retained and the entire fee is taxed, the life tenant has the duty of paying the tax.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" and last name "Danforth" clearly distinguishable.

JOHN C. DANFORTH
Attorney General

February 24, 1971

OPINION LETTER 175
Answered by Klaffenbach

Honorable Donald L. Manford
Senator, 8th District
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This letter is in response to your opinion request in which you ask concerning the propriety of an ordinance of a fourth class city which purports to authorize the city to reimburse certain officials for membership dues in professional organizations.

This type of question has been subject to quite some diversity of opinion in the various courts. It is noted in 15 McQuillin Municipal Corporations at page 56 that:

"While the expenditure of public funds for membership in a municipal league or to defray expenses of municipal officers appointed to attend a convention or conference of a municipal league has been recognized as public or municipal purposes, the opposite view has been taken, both as to such dues and expenses. Thus, payment of expenses of city officers attending conventions has been held not for a public purpose."

A similar view is expressed in 64 C.J.S. §1845.

Clearly the common law, even without the aid of any constitutional inhibition forbids the levying and collecting of taxes by a city for any private purpose or business. State ex rel Kansas City v. Orear, 210 S.W. 392 (Mo. 1919).

In this instance the ordinance allows certain reimbursement for membership in "professional organizations" and it is not clear whether the actual application of the ordinance will serve a public purpose so as to be permissible. Further, while we are certain that the Missouri courts will give a strict construction to any measure dealing with the expenditure of public funds the instant case involves a mixed question of law and fact and a controversy that cannot be determined by an opinion of this office.

Page 2

For your further information we are enclosing Opinion No. 350 dated September 30, 1969, to Holman and Opinion No. 167 dated July 10, 1969, to Branom, both of which deal with related subjects.

Very truly yours,

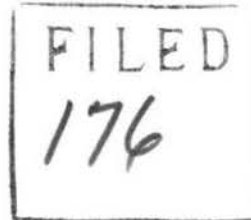
JOHN C. DANFORTH
Attorney General

Enclosures

April 16, 1971

OPINION LETTER NO. 176
Answer by Letter-Klaffenbach

Honorable Richard Southern
201 West Summer
Monroe City, Missouri 63456



Dear Mr. Southern:

This is in response to your request for an opinion from this office as follows:

"Can the legislature enact as part of a Scenic Rivers Law Section 16-(restricting the cutting of timber within fifty feet of a stream or river) and Section 19 (restricting developing and commercialization within eighty-five yards of the banks of rivers and streams?

"Can the Conservation Commission under Article IV, sections 40a-46 of the Missouri Constitution act as administrator of a Scenic Rivers system as proposed by the committee recommended bill?"

In response to your first question, we are enclosing herewith Opinion No. 238 issued by this office on April 7, 1970, to Honorable Ted Salveter. This opinion discusses the general principles of law involved in an act similar to the one you inquire about, and we believe the answer to your first question will be found by applying the principles of law discussed in this opinion to the provisions of your bill.

Your second question asks whether the Conservation Commission can be authorized by the state legislature to act as administrator of a scenic rivers system as proposed by a bill which you enclose.

Honorable Richard Southern

Section 40 (a) of Article IV of the Missouri Constitution states that the Conservation Commission shall have the "control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, ...".

It appears from the debates of the Constitutional Convention of 1945 that there was extensive discussion with respect to the use of the word "forestry" in this section. An amendment to delete the word was defeated and in doing so the delegates recognized that the Conservation Commission was, under the old constitutional amendment, exercising broad forestry powers and that such powers were not limited merely to the protection of forestry for the preservation of game.

It appears also that the almost concurrent enactment of the forestry laws which are contained in Chapter 254, RSMo 1969, and which vest forestry powers in the Conservation Commission gives us a further indication that the legislature was of the view that the Commission was given broad powers by the Constitution with respect to forestry.

We have noted from the citation and quotation of Section 40 (a) of Article IV that the Commission has the "administration of all laws pertaining" to such subjects as are therein provided including forestry. While there is no Missouri case authority to aid us in answering your precise question it is our view that the powers given to the Conservation Commission in the bill to which you refer and which we have made a part of our file, are in aid of and in support of the powers given the Conservation Commission under the Missouri Constitution.

Having reached this conclusion we do not believe it is necessary to pass on the question of whether a statute would be valid if such statute conferred duties on the Conservation Commission completely divorced from the powers, authority and duties given to the Commission by the Constitution.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 238 - April 7, 1970 - Salveter

SCHOOLS:
TEACHERS:

A school board of a six-director school district may terminate a probationary teacher's contract pursuant to the terms of subsection 2 of Section 168.126, RSMo 1969, if a written statement is delivered to the probationary teacher setting forth each and every area of incompetency in which the board desires improvement in sufficient detail so as to permit the teacher to have an opportunity to correct the alleged faults within ninety days. If the alleged incompetency is not corrected, the board may, pursuant to subsection 2 of Section 168.126, RSMo 1969, terminate the employment of the probationary teacher immediately or at the end of the school year.

OPINION NO. 178

July 19, 1971

Honorable Granvil B. Vaughan
Representative, District 163
Route 1
West Plains, Missouri 65775

FILED

178

Dear Representative Vaughan:

This official opinion is issued in response to your request for a ruling on the following questions pertaining to Section 168.126, RSMo 1969:

- "1. Whether the annexed letter, after due consultation and enumeration of the teacher's faults by the administrative staff and Board of Education, is sufficient to comply with paragraph two of this section.
- "2. If this letter is sufficient notice, is the Board of Education authorized to terminate teacher's employment immediately by this section, and if the School Board may terminate a teacher's employment immediately, may they prorate according to the number of days taught the annual remuneration of said teacher.
- "3. If the Board may not immediately terminate a probationary teacher, is it required to give ninety days notice prior to refusing to tender a contract to said probationary teacher for the forthcoming school year or may they merely notify said teacher between April 1 and April 15 of each school year that said probationary teacher will not be retained by the School Board."

Honorable Granvil B. Vaughan

Subsection 2 of Section 168.126 reads as follows:

"2. If in the opinion of the board of education any probationary teacher has been doing unsatisfactory work, the board of education through its authorized administrative representative, shall provide the teacher with a written statement definitely setting forth his alleged incompetency and specifying the nature thereof, in order to furnish the teacher an opportunity to correct his fault and overcome his incompetency. If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. Any motion to terminate the employment of a probationary teacher shall include only one person and must be approved by a majority of the members of the board of education. A tie vote thereon constitutes termination. On or before the fifteenth day of April but not before April first in each school year, the board of education shall notify a probationary teacher who will not be retained by the school district of the termination of his employment."

Question 1

In order for the Board of Education to terminate the contract of a probationary teacher during its term, the board must "... provide the teacher with a written statement definitely setting forth his alleged incompetency and specifying the nature thereof, in order to furnish the teacher an opportunity to correct his fault and overcome his incompetency. . . ." Subsection 2, Section 168.126.

With reference to the particular letter enclosed with your request, we do not believe it appropriate for this office to rule whether a specific letter to a specific teacher complies with Section 168.126, RSMo 1969.

As a general rule, we believe that written statements furnished to probationary teachers should be as complete and detailed as possible so that the teacher in question will have "... an opportunity to correct his fault and overcome his incompetency. . . ." Naturally, it is imperative that the board set forth every area of incompetency

Honorable Granvil B. Vaughan

upon which it requires improvement so that the teacher will be informed of those areas in which improvement is necessary. Furthermore, we believe that the teacher should be furnished with as many specific examples of the alleged incompetency as the school board has available to it so that the teacher can see precisely where improvement is needed.

Question 2

Your second question asks us to assume that the letter quoted above is sufficient notice and that the teacher does not improve satisfactorily during the ninety day period after receipt of the notification. Could the board then terminate the probationary teacher's contract immediately?

Subsection 2 of Section 168.126 provides that ". . . If improvement satisfactory to the board of education has not been made within ninety days of the receipt of the notification, the board of education may terminate the employment of the probationary teacher immediately or at the end of the school year. . . ." (Emphasis added.) This language authorizes the school board to terminate a probationary teacher's contract immediately after the expiration of the ninety day period if satisfactory improvement is not made.

You then inquire whether the school board may prorate the annual remuneration of said teacher according to the number of days taught. This question envisions a termination date which occurs in the middle of a pay period. Although the statute makes no mention of the basis upon which a teacher terminated pursuant to Section 168.126 should be compensated, we believe that the teacher should be paid for each and every day in which services are rendered to the district prior to the date he is lawfully terminated.

Question 3

Having concluded, in response to question 2, that a school board may immediately terminate a probationary teacher under the circumstances set forth above, we understand that an answer to question 3 is not desired.

CONCLUSION

Therefore, it is the opinion of this office that a school board of a six-director school district may terminate a probationary teacher's contract pursuant to the terms of subsection 2 of Section 168.126, RSMo 1969, if a written statement is delivered to the probationary teacher setting forth each and every area of incompetency in which the board desires improvement in sufficient

Honorable Granvil B. Vaughan

detail so as to permit the teacher to have an opportunity to correct the alleged faults within ninety days. If the alleged incompetency is not corrected, the board may, pursuant to subsection 2 of Section 168.126, RSMo 1969, terminate the employment of the probationary teacher immediately or at the end of the school year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

JOHN C. DANFORTH
Attorney General

May 17, 1971

OPINION LETTER NO. 180

Answer by Letter (Klaffenbach)

Honorable Charles E. Valier
Representative, District 69
Room 235B-G, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Valier:

This letter is in response to your opinion request
in which you ask:

"... . Can the Assessor of the City of
St. Louis voluntarily maintain assess-
ments at the present level without in-
creasing them when improvements are made
on property without being in violation
of Article 10, Section 3 of the
Constitution or any other laws of
the State of Missouri?"

Article X, Section 3 of the Missouri Constitution
which you cite, provides:

"Taxes may be levied and collected for
public purposes only, and shall be uniform
upon the same class of subjects within the
territorial limits of the authority levying
the tax. All taxes shall be levied and
collected by general laws and shall be pay-
able during the fiscal or calendar year in

Honorable Charles E. Valier

which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law."

Section 137.490, RSMo 1969, with respect to assessments in the City of St. Louis provides:

"The assessor, or his deputies under his direction, shall assess all the taxable real property within the city and all tangible personal property taxable by the city under the laws of this state in the manner provided in sections 137.485 to 137.550 and as otherwise provided by law, and for that purpose the assessor may divide and assign the work or any of it among them. They shall commence their assessment on the first day of January in each year and complete the assessment, and the deputies make their final reports thereof to the assessor, on or before the first day of April next following. The assessor shall see that the assessment is made uniform and equal throughout the city. If the assessor proposes to increase any assessment of real property, he shall give notice of the fact to the person owning the property affected, his agent or representative, by personal notice, or by mail directed to the last known address."

We note that under Section 82.560, RSMo 1969, the assessor of such a constitutional charter city takes an oath similar to that taken by county assessors under Section 53.030, RSMo 1969, to "assess all of the real and tangible personal property in the county in which he assesses at what he believes to be the actual cash value." This duty was noted by the Missouri Supreme Court in Columbia Terminals Co. v. Koeln, 3 S.W.2d 1021. Further, the Supreme Court stated, in State v. Gehner, 5 S.W.2d 40, 45, that:

". . . The Constitution of this state (article 10, section 4) requires that 'all property subject to taxation shall

The Honorable Charles E. Valier

be taxed in proportion to its value.' Under our Constitution, the species of property taxed (whether it be tangible property, real or personal, or whether it be the shares of the capital stock of a banking corporation) must be taxed 'in proportion to its value,' i.e., the actual or real value; not a false or fictitious value, but a value which is neither inflated nor deflated. ..."

The present provision of the Missouri Constitution with respect to valuation, Article X, Section 4(b) provides:

"Property in classes 1 and 2 [real property and tangible personal property] and subclasses of class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2. Property in class 3 [intangible personal property] and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof." [Bracketed matter added; see Article X, Section 4(a)]

Likewise with respect to the classification of realty and the uniformity of taxes upon the same class of subjects the Missouri Supreme Court in Drey v. State Tax Commission, 345 S.W.2d 228 stated at 1.c. 236-237:

"...Like classification of real property and uniform taxes upon the same class of subjects, however, are not only possible but are required, by Constitution of Missouri, 1945, Art. X, §§4(a) and 3, respectively. There are no subclassifications of real estate for the purposes of taxation. (Citation) ... An intentional

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plan or design of discrimination by which one kind or class of property is systematically assessed at a higher percentage of its value than other property in the county works a constructive fraud upon each property owner thus discriminated against. ..."

We therefore conclude that assessments must be made each year, improvements must be valued and included in such assessments and uniformity must be maintained.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
NATIONAL FORESTS:

A junior college district located partly or wholly within or adjacent to Clark National Forest in the county in which such forest is located is eligible under Section 12.070, RSMo 1969, to share in the funds received by the state from the federal government pursuant to the National Forest Reserve Act.

OPINION NO. 182

May 5, 1971

Honorable Edna Eads
Representative, District 149
Room 203, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Eads:

This is in response to your request for an opinion from this office with regard to the following question:

"I would appreciate a ruling from you as quickly as possible regarding distribution of money received off the Clark National Forest.

"The question is: Chapter 12, Section 100 of the Missouri Statutes states that the County Court is to disperse these funds to the school districts. Is a Junior College in fact a school district as mentioned?"

For purposes of this opinion, we note that the land included within the Clark National Forest is federally owned and is, therefore, not subject to a school district's taxing power under Article X, Section 11(b) and (c) of the Constitution of Missouri of 1945.

Section 12.070, RSMo 1969, establishes the manner in which national forest reserve funds received by the State of Missouri shall be distributed to the various counties in which a national forest reserve is located. Section 12.070 reads as follows:

"Sums received from United States shall be expended, how.--All sums of money received from the United States under an act of congress, approved May 23, 1908, being an act providing for the payment to the states of twenty-five percent of all money received from the national forest

Honorable Edna Eads

reserves in the states to be expended as the legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated (16 U.S.C.A. §500) shall be expended as follows: Seventy-five percent for the public schools and twenty-five percent for roads in the counties in which national forests are situated. The funds shall be used to aid in maintaining the schools and roads of those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county. The distribution to each county from the proceeds received on account of a national forest within its boundaries shall be in the proportion that the area of the national forest in the county bears to the total area of the forest in the state, as of June thirtieth of the fiscal year for which the money is received."

This section provides that seventy-five percent of the national forest reserve funds received by the state shall be spent for schools and twenty-five percent for roads of ". . . those school districts that lie or are situated partly or wholly within or adjacent to a national forest . . ." in the county in which such forest is located. This section, then, directs the manner in which national forest reserve funds are distributed to various counties and the purposes for which such funds are to be expended, but does not direct the manner or amount of distribution after the money reaches the various counties.

Section 12.080, RSMo 1969, provides that funds received by the state pursuant to the Flood Control Act, 33 U.S.C. Section 701c-3 shall be expended by the county court of the county in which the government land is located, either for the benefit of the schools and roads of such county or for defraying the expenses of such county government.

Section 12.100, RSMo 1969, reads as follows:

"County court to use funds in maintaining schools and roads.--The county court of each county receiving any such moneys shall use the funds to aid in maintaining the schools and roads and for defraying any of the expenses of the county in accordance with the provisions set forth in sections 12.070 and 12.080. The county court shall allow to the school districts

Honorable Edna Eads

and for roads an amount based upon their respective levies equal to that which would ordinarily be allowed to them out of taxes from property owned by the United States if the property were privately owned before using any of the moneys for defraying other expenses of the county."

In Opinion No. 77, dated February 4, 1969 (copy enclosed), this office determined (1) that the second sentence of Section 12.100 applied only to funds distributed to a county court pursuant to Section 12.080 and was inapplicable to funds received pursuant to Section 12.070, and (2) that a county court of a county receiving national forest reserve funds pursuant to Section 12.070 could distribute such funds to those school districts that are situated partly or wholly within or adjacent to the national forest in such county upon any basis, which in its discretion, the court determined proper. Thus, the question in the present case is not whether a junior college district is a "school district" within the meaning of Section 12.100, but whether such junior college district is included within the mandatory provisions of Section 12.070 directing that seventy-five percent of the national forest reserve funds received by the state shall be used for schools in ". . . those school districts that lie or are situated partly or wholly within or adjacent to the national forest in the county. . . ." We believe that it is.

A junior college district, in conjunction with other school districts, provides public education for resident pupils. Article IX, Section 1(a), Constitution of Missouri of 1945; Section 178.850, RSMo 1969. Likewise a junior college district depends to a large extent upon its taxing powers under Article X, Section 11(b) and (c), Missouri Constitution of 1945, for its financial existence. It is axiomatic that the presence of national forest lands in a school district, junior college or otherwise, deprives the district of revenue because those lands are removed from the local tax rolls. We believe that Congress by enacting 16 U.S.C. Section 500 and the Missouri General Assembly by enacting Section 12.070 intended to provide some compensation to school districts located within or adjacent to national forest lands for this loss of revenue. In recognition of this purpose, we believe that a junior college district situated partly or wholly within or adjacent to Clark National Forest in the county in which such forest is located comes within the provisions of Section 12.070.

Part of 16 U.S.C. Section 500 of the National Forest Reserve Act provides as follows:

"Payment and evaluation of receipts to State
for schools and roads

Honorable Edna Eads

Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: . . ."

Although this section leaves it to the state to direct the amount of payments to be used for either schools or roads of the county or counties in which a national forest is located, this is by no means inconsistent with the idea that the payments are for the purpose of providing some reimbursement for lost school or road taxes. Admittedly, the payments under 16 U.S.C. Section 500 are not to be made to the various taxing entities in proportion to the amount of revenue lost and, therefore, may not be technically payments in lieu of taxes. Nevertheless, the conclusion is inescapable that the purpose underlying Section 500 was to provide some measure of compensation to local school districts for the loss of tax revenue. Why else would the federal statute direct aid for the benefit of only those areas upon which the impact of the federal presence falls most heavily. Thus, even though there is conflict as to whether the payments pursuant to the federal statute constitute a trust for the benefit of the deprived local taxing units, Trinity Independent School Dist. v. Walker County, 287 S.W.2d 717 (Ct.Civ. App.Tex. 1956), or an absolute grant or gift to the state, King County v. Seattle School District No. 1, 263 U.S. 361, 44 S.Ct. 127, 68 L.Ed. 339 (1923), the purpose and policy behind the federal statute was to provide partial reimbursement to certain local tax authorities which were deprived of tax revenue by the presence of national forest lands within their boundaries.

A part of the federal Flood Control Act, 33 U.S.C. Section 701c-3, provides for a method of distribution of monies received from federal lands similar to that of Section 500 of the National Forest Reserve Act. Section 701c-3 reads as follows:

"Same; lease receipts; payment of portion to States

75 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of the leasing of lands acquired by the United States for flood control, navigation, and allied purposes, including the development of hydroelectric

Honorable Edna Eads

power, shall be paid at the end of such year by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county, or counties, in which such property is situated, or for defraying any of the expenses of county government in such county or counties, including public obligations of levee and drainage districts for flood control and drainage improvements: . . ."

As stated above, Sections 12.080 and 12.100, RSMo 1969, provide that the county court of the county in which federal land is located shall allocate the funds received pursuant to the Flood Control Act to the schools and roads of those school districts in which the government land is situated. The purpose of Section 701c-3 was expressed in the report of the Senate Committee on Public Works as follows:

"This legislation was enacted to provide some measure of compensation to the local taxing units for the loss of taxes which results when lands acquired by the Federal Government for flood-control purposes are removed from the local tax rolls." 1953 U.S. Code Cong. & Adm. News, p. 1683

When reading Section 701c-3 in pari materia with Section 500, it is apparent that the same legislative purpose underlies the similar provisions in the latter section providing for payments to a state in which a national forest reserve is located for the benefit of schools and roads of the county or counties in which the reserve is situated.

Nothing contained in either Section 500 or Section 12.070 indicates that the Congress or the Missouri General Assembly intended to restrict payments received by the state pursuant to the National Forest Reserve Act to elementary or high school districts, and to exclude junior college districts which suffer the same hardship due to the removal of federal lands from their tax rolls. In fact, to achieve the purpose and objective of Section 500 and Section 12.070, we must conclude that a junior college district located partly or wholly within or adjacent to a national forest in the county in which such forest is located is eligible to share in revenues paid to the state pursuant to Section 500.

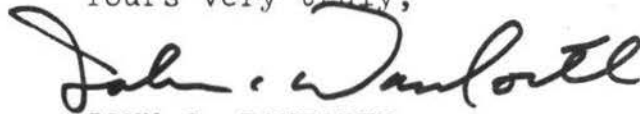
Honorable Edna Eads

CONCLUSION

It is, therefore, the opinion of this office that a junior college district located partly or wholly within or adjacent to Clark National Forest in the county in which such forest is located is eligible under Section 12.070, RSMo 1969, to share in the funds received by the state from the federal government pursuant to the National Forest Reserve Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 77
2-4-69, Bergbauer

March 12, 1971

OPINION LETTER 185
Answered by Klaffenbach

Honorable Harold Dickson
Representative, District 121
Room 202G, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Dickson:

This letter is in answer to your opinion request in which you ask whether a member of the city council of a third class city all of which is located within a special road district in a third class county is eligible to serve as a commissioner in the special road district organized under Sections 233.010 to 233.165 RSMo. 1969.

For the reasons expressed in our opinion No. 19 dated March 3, 1966, to the Honorable Robert P. Warden, copy enclosed, we are of the view that such an appointment of one who is a member of the appointing board is against public policy and is void.

Very truly yours,

JOHN C. DANFORTH
Attorney General

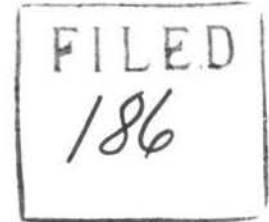
SCHOOLS:
TEACHERS:

When two or more school districts consolidate and form a new school district, the new consolidated district should give the teachers under contract with each component district credit, in accordance with the Teacher Tenure Act, particularly Section 168.104, RSMo 1969, for all years of employment in a component district.

OPINION NO. 186

July 9, 1971

Honorable Richard DeCoster
Representative, District 94
Canton, Missouri 63435



Dear Representative DeCoster:

This is in reply to your request for an official opinion from this office concerning the following question:

" . . . Does time served as a teacher employed by a school district count toward tenure when that school district is incorporated into a new, larger school district and the teacher is then employed by the new school district? That is does time served in the old district count toward tenure in the new district. Or, must the teacher be employed as a teacher for five successive years in the new district before attaining tenure? (168.104 R.S.Mo 1969)

* * *

" . . . In 1967 the voters of Lewis County School districts R-I, R-II, R-IV and R-VI elected to consolidate into one new Lewis County C-I School District. The school board of the new district (C-I) employed many of the teachers who had taught in the old districts. Some of these teachers remained in the same buildings and taught the same subjects or grades. Others were transferred to different units in the new system. In the fall of 1970 a new facility known as Highland High School was put into service to accomodate [sic] the senior high school pupils of the C-I district. In [sic] understand some of the teachers in question were then assigned to the new facility.

Honorable Richard DeCoster

"The question is does continuous time served as a teacher-employee of R-I, R-II, R-IV or R-VI count toward the 5 year tenure required as an employee of the C-I where there was no interruption of employment between the two systems?"

Section 168.104(4), RSMo 1969, describes the manner whereby a teacher obtains tenure and reads, in part, as follows:

"'Permanent teacher', any teacher who has been employed in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district; except that, when a permanent teacher resigns or is permanently separated from employment by a school district, and is afterwards reemployed by the same school district, reemployment for the first school year does not constitute an indefinite contract . . ."

Thus, a teacher obtains "permanent teacher" status, or tenure, upon being reemployed by the same school district for a sixth successive year. Upon such reemployment the school district must enter into an "indefinite contract" with the teacher. This contract, providing for annual reemployment, continues in force from year to year without renewal and may be terminated only for certain enumerated statutory reasons. Sections 168.106 to 168.114, RSMo 1969. A teacher who has been employed by the same school district for less than six successive years is known as a "probationary teacher." Section 168.104(5), RSMo 1969. The probationary teacher is only entitled to an annual contract of employment. Section 168.126, RSMo 1969. The school board may, each year, elect whether or not to tender a new contract for the ensuing year.

Section 168.122, RSMo 1969, authorizes a school board to place a probationary teacher on a temporary part-time teaching schedule, and provides that such part-time employment shall not be counted towards tenure. Section 168.126(2), RSMo 1969, authorizes a school board to terminate a probationary teacher's contract for full-time employment due to unsatisfactory performance. There is, however, no provision in the Teacher Tenure Act, Sections 168.102 through 168.130, RSMo 1969, authorizing a school board to withhold credit towards tenure for one or more years of successive full-time employment by a probationary teacher. If a school board is not satisfied with a probationary teacher's performance, it may either elect to terminate his contract or not renew his contract for the next school year in accordance with Section 168.126(2). But if

Honorable Richard DeCoster

the school board continues to reemploy the probationary teacher, it must allow credit for prior successive yearly employment and execute an indefinite contract with the teacher upon reemployment for the sixth successive year. The length of successive yearly service, therefore, constitutes an important part of the probationary teacher's contract rights. Correspondingly, this legal right to be accorded tenure credit is an obligation binding upon the school district.

In the present factual situation the Lewis County C-I School District, a consolidated six-director school district, has, from its inception, reemployed teachers who were formerly employed by one of the four individual districts which now comprise the larger consolidated district. The legal effect of consolidation was considered by the Missouri Supreme Court in Lewis County C-I School District v. Normile, 431 S.W.2d 118 (Mo. banc 1968). The voters of each of the four component school districts had, shortly before adoption of the plan for consolidation, approved tax rates for their respective districts in the following amounts: R-I, \$2.50; R-II, \$2.55; R-IV, \$3.20; and R-VI, \$3.25. These taxes were assessed and extended upon the general tax books in the names of each of the respective districts. The plan to consolidate the four school districts was subsequently approved on May 26, 1967; however, no election was called in the newly formed consolidated district to authorize a tax levy in excess of the constitutional limitation. A suit was brought by a group of taxpayers of the consolidated district to enjoin the collection of taxes at the rates assessed, or at any rate exceeding that which can be levied without voter approval. The Supreme Court of Missouri held that the consolidated school district could collect the taxes levied in the four predecessor districts, stating:

"... It is the general statutory plan that when a consolidation of school districts is approved the component districts shall immediately cease to exist and the newly formed district shall be entitled to receive all of the assets of said districts, and shall be liable for all of the debts and legal obligations of said former districts. See § 162.251; State ex rel. Consolidated School District No. 8 of Pemiscot County v. Smith, 343 Mo. 288, 121 S.W.2d 160 [5]; State ex rel. Smith v. Gardner, Mo.App., 204 S.W.2d 319 [1]. We think the taxes approved and levied in each of the component districts immediately became a property right or intangible asset of each district. Upon the approval of the plan of reorganization those assets became the property

Honorable Richard DeCoster

of the new district and it was entitled to receive the taxes collected. . . ." Id. at 121.

Along with the assets and benefits a consolidated school district must accept the obligations and burdens as well. Section 162.251, RSMo 1969, provides that a plan to form a consolidated six-director school district shall become effective on July 1 following the election and that:

". . . The new district shall faithfully perform all existing contracts and assume all legal obligations of the component districts."

Thus, on July 1, 1967, the Lewis County C-I School District came into legal existence and Lewis County School Districts R-I, R-II, R-IV and R-VI ceased to exist. The new consolidated six-director school district assumed all the legal obligations of the component district and was required to faithfully perform all its existing contracts. An indefinite contract between a permanent teacher and one of the component districts constitutes such an obligation that became binding upon the consolidated district. Faithful performance of that contract required the consolidated district to provide the permanent teacher with the benefits of an indefinite contract in the new district. Thus, a teacher who had been reemployed by one of the predecessor districts for a sixth successive year before consolidation would automatically obtain tenure with the consolidated district.

A probationary teacher's annual contract of employment must be executed in April of each year. Section 168.126(3), RSMo 1969. As stated above, the Lewis County consolidated school district came into legal existence on July 1, 1967. Therefore, annual contracts of employment which were executed in April, 1967, between probationary teachers and the component school districts also became binding upon the consolidated district. Faithful performance of these contracts required that the consolidated district provide the probationary teacher with employment in the new district for the ensuing school year, and that it grant credit toward tenure with the new district for that year's employment.

Part of the probationary teacher's contract rights is the right to receive credit toward tenure for previous successive yearly employment. Upon consolidation the new district assumed the obligation of its component districts to give probationary teachers such credit. Thus, faithful performance of probationary teachers' contracts existing at the time consolidation took effect also required that the new district allow credit towards tenure with the consolidated district not only for the current year but for prior years of service with the component districts as well. After the

Honorable Richard DeCoster

consolidated district had performed annual contracts of employment existing at the time consolidation became effective, it was empowered to elect whether or not to reemploy probationary teachers for the next school year. For those probationary teachers whom it did reemploy, the district was required to grant credit towards tenure for prior successive yearly employment with the consolidated district and with one of the component districts.

CONCLUSION

It is, therefore, the opinion of this office that when two or more school districts consolidate and form a new school district, the new consolidated district should give the teachers under contract with each component district credit, in accordance with the Teacher Tenure Act, particularly Section 168.104, RSMo 1969, for all years of employment in a component district.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, D. Brook Bartlett and John B. Mitchell, Jr.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

March 29, 1971

Opinion Letter No. 188
(Answered by Klaffenbach)

Honorable Samuel J. Short, Jr.
Prosecuting Attorney
Court House
Stockton, Missouri 65785



Dear Mr. Short:

This letter is in response to your request for an opinion which asks the following questions:

"I respectfully request your opinion as to whether Section 50.600 RSMo 1969 applies to 3rd class counties and if 3rd class counties are required thereby to have at least one public hearing on their proposed budget.

"I would also respectfully request your opinion as to whether the allowance of mileage for Sheriffs and deputies provided for in Section 57.430 RSMo 1969 wherein the maximum amount allowable for mileage is limited to \$200 during any calendar month applies to the Sheriff and each deputy or is the limitation of \$200 applicable to the entire Sheriff's department, i.e. is a Sheriff's department entitled to \$200 per month for the Sheriff plus \$200 per month for each deputy as a mileage allowance or only entitled to an allowance of \$200 for the Sheriff and all deputies?"

Honorable Samuel J. Short, Jr.

Section 50.600, RSMo 1969, to which you refer states:

"The budget document shall be presented to the county court in typewritten or in printed form. Copies shall be available for public distribution. The county court shall hold at least one public hearing on the proposed budget before final action is taken. At least five days' notice of the hearing shall be given and the hearing shall not be held within ten days after the budget document is made available to the public."

With respect to the application of Section 50.600 we believe that the answer is rather graphically illustrated in V.A.M.S. "County Budget Laws" wherein there is set forth and compared Section 50.525 as it was prior to the 1965 amendments with Section 50.525 as it was after the 1965 amendments effective January 1, 1967. That is, prior to the enactment of House Bill No. 205 of the 73rd General Assembly Section 50.525 stated:

- "1. Sections 50.525 to 50.740 may be cited as 'The County Budget Law'.
- "2. Sections 50.540 to 50.660 apply to counties of classes one and two and Sections 50.670 to 50.740 apply to counties of classes three and four."

Present Section 50.525 states:

"Sections 50.525 to 50.745 may be cited as 'The County Budget Law.'"

Also in this respect we note that old Section 50.530 defining "budget officer" pertained solely to class one and to class two counties whereas the definition in present Section 50.530, RSMo 1969, pertains to officers in all four classes of counties. Similar changes were made in Section 50.540.

In addition Section 50.620 was amended so as to clearly expressly apply to only counties of classes one and two

Honorable Samuel J. Short, Jr.

whereas Section 50.740 was amended to make it clear that it expressly applies only to classes three and four.

Thus in view of the changes made in these statutes and since there are no express restrictions in Section 50.600, it appears that the legislature intended that the Section now apply to all counties and not just to counties of classes one and two.

In answer to your second question with respect to the \$200.00 mileage allowance of Section 57.430, RSMo 1969, we enclose Opinion No. 68, dated November 21, 1955, to the Honorable Don W. Owensby in which we held that the total maximum allowance, which was at that time \$75.00, may be paid separately to the Sheriff and each deputy. In our view therefore the present \$200.00 maximum is the maximum for each officer.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 68
11-21-55, Owensby

March 10, 1971

Opinion Letter No. 189
Answered by Klaffenbach

Honorable Donald B. Clark
Assistant County Counselor
Jackson County
Court House Suite 202
Kansas City, Missouri 64106

FILED
189

Dear Mr. Clark:

This letter is in answer to your request for an opinion in which you state:

"The problem presented by the Jackson County Assessor relates to aircraft owned and operated privately from air fields in Jackson County, which aircraft are also hangared and maintained at an airport in Jackson County. The owners of such aircraft, being also residents of Jackson County, do not reside in the same school district in which the airport is located and within which the hangar and maintenance and facilities where the aircraft are operated. By reason of the fact that aircraft are not included in the specific exception under Section 137.090, it is presumed that all such aircraft are properly assessable in Jackson County as the county of the owner's residence. In making such assessment, however, the assessor must determine and allocate to a specific school district the portion of the tax revenue resulting from the personal property tax levied against that aircraft. Where the physical situs of the aircraft is within one school district and the residence of the owner is in another, all within the limits of Jackson County, an opinion is requested as to which school district is entitled to the revenue and of course, which tax levies should be applied."

As you noted in your question Section 137.090 RSMo. 1969 was amended and an exception made with respect to houseboats, cabin cruisers and automobile trailer houses used for lodging. No such exception was made for airplanes and therefore there is no reason to believe that airplanes would be treated in any way different than other not excepted personalty.

Honorable Donald B. Clark

Therefore in answer to your question we are enclosing Opinion No. 21, dated December 21, 1954 to the Honorable Dick B. Dale, Jr. wherein this office held that tangible personal property of an individual should be assessed to the benefit of the school district wherein the owner of the property resides even though such property itself is located in another school district within the same county.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion No. 21,
December 21, 1954,
Dale

March 23, 1971

Opinion Letter No. 191
Answered by letter (Klaffenbach)

Honorable Walter L. Meyer
Missouri House of Representatives
State Capitol - Room 410
Jefferson City, Missouri



Dear Mr. Meyer:

This letter is in response to your opinion request in which you ask the following question:

"As you know the Senatorial Redistricting Committee met in the Senate Lounge on March 2, 1971, to organize their members. They organized, in my opinion, in violation of our State Constitution under Article 3, Section 7, by electing co-chairmen to head this commission. The Constitution clearly states they shall organize on the 15th day excluding Sundays and holidays, after they have been selected. The Constitution says there shall be a Chairman, a Vice-chairman, and a Secretary. I believe they violated this section of the Constitution by electing co-chairmen."

Section 7 of Article III of the Missouri Constitution provides that such commissioners shall "proceed to organize by electing from their number a chairman, vice-chairman and secretary".

We note that the above terminology was new in the amendment which was adopted at the special election January 14, 1966.

Your inquiry does not indicate the function that the "co-chairmen" are intended to perform and we presume that they are to perform the duties of the chairman, each exercising co-equal authority.

Honorable Walter L. Meyer

While we find no judicial guidelines on this exact point it is our view that although such an election is a literal deviation from the express language of the constitutional provision and as such is certainly questionable, we do not view it as a substantive violation of Section 7 of Article III of the Constitution.

We do not believe that districts established by the commission would be set aside or invalidated because of the election of co-chairmen by the commission.

Very truly yours,

JOHN C. DANFORTH
Attorney General

March 11, 1971

Answer by Letter (Bartlett)

OPINION LETTER NO. 192

Honorable John J. Johnson
State Senator
Fifteenth District
State Capitol
Jefferson City, Missouri 65101



Dear Senator Johnson:

This letter is in response to your request for an opinion on the question of whether House Bill No. 26 violates any part of the Missouri Constitution or of the Federal Constitution.

We do not believe this bill is clearly unconstitutional under either the Missouri Constitution or the Federal Constitution. Therefore, because all bills enacted by the Missouri legislature have a presumption of constitutionality attached to them and because this office would be in the position of defending the constitutionality of House Bill No. 26 should it pass the legislature, we believe it would be inappropriate for this office to comment in detail on possible constitutional problems this bill may have.

The research we have done on this bill and the one introduced in the Seventy-fifth General Assembly is available to you. If you would be interested in discussing this bill and the arguments which might be made respecting its constitutionality, one of my assistants, D. Brook Bartlett, is familiar with this matter and would be available to meet with you.

Very truly yours,

JOHN C. DANFORTH
Attorney General

RETIREMENT:
SOCIAL SECURITY:

The Missouri Local Government Employees' Retirement System is an instrumentality of the state and/

or one or more of its political subdivisions within the meaning of the Social Security Act.

OPINION NO. 193

June 1, 1971

Honorable John C. Vaughn
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This is in response to your request for an opinion as to whether Missouri Local Government Employees' Retirement System (LAGERS) is an instrumentality of the state and/or one or more political subdivisions of the state under Section 218 of the Social Security Act, 42 U.S.C.A. Section 418.

Section 218b(2) of the Social Security Act provides that the term "political subdivision" includes an "instrumentality" of a state, one or more of the political subdivisions of a state, or the state and one or more of its political subdivisions. The Social Security Act does not expressly define the term "instrumentality." However, the Handbook for State Social Security Administrators put out by the United States Department of Health, Education and Welfare provides that the issue of what is a political subdivision is a question of state law, Section 130(h). Since under federal law Section 218b(2) of the Social Security Act provides that the term "political subdivision" includes an instrumentality of one or more political subdivisions of the state, we believe we must consider state law to determine if LAGERS is an instrumentality of the State of Missouri and/or one or more of its political subdivisions for the purposes of the Social Security Act.

We find that Sections 105.300 to 105.495, RSMo 1969, are the state statutes which deal with social security coverage of Missouri public employees. Section 105.300(7) provides with respect to the term "instrumentality" as follows:

"(7) 'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political

Honorable John C. Vaughn

subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

We believe that section to include instrumentalities of both the state and one or more of its subdivisions, as well as each separately. Therefore, it is appropriate to consider, first, whether LAGERS is an instrumentality of the state and/or its subdivisions; and then, whether as an instrumentality, it comes within the scope of Section 105.300(7) for purposes of the Social Security Act.

In Opinion No. 282, Trigg, 1964, we had occasion to consider a similar question with respect to the Missouri Bar, which we held to be an instrumentality of the state for purposes of the Social Security Act. There we stated:

"There is no all-inclusive definition of the term 'instrumentality'. See Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Company, 215 N.C. 491, 2 S.E.2d 592. In Falls City Brewing Company v. Reeves, 40 F. Supp. 35, 1.c. 39, in holding that a military post exchange was a governmental instrumentality and therefore tax exempt, the court stated:

"'Instrumentality' is defined by Webster as 'condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris. page 947, as 'anything used as a means of an agency; that which is instrumental; the quality or condition of being instrumental.'"

"Pointing out that post exchanges are not purely voluntary organizations, the court held that they are set up, organized and operated pursuant to military authority. So, too, the Missouri Bar, having been set up, organized and operated pursuant to court authority for the more effective exercise of the judicial authority over the legal profession, the Bar is therefore an agency or instrumentality of the state, having those powers, purposes and functions which have been delegated and conferred upon it by the Supreme Court."

Honorable John C. Vaughn

Sections 70.600 to 70.760, RSMo 1969, concern the organization and powers of LAGERS. In Section 70.605 we find the purpose of LAGERS is to provide ". . . for the retirement or pensioning of the officers and employees and the widows and children of deceased officers and employees of any political subdivision of the state, . . ." Once a political subdivision of the state elects to become an employer as that term is defined by Section 70.600(11), RSMo 1969, all employees of a political subdivision who are not excluded by statute are members of the system, Section 70.630, RSMo 1969. Therefore, LAGERS is not a voluntary organization. Rather, LAGERS is a creation of the General Assembly under the powers granted that body by Article VI, Section 25 of the State Constitution which permits the General Assembly by statute to authorize:

". . . any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the widows and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; . . ."

Therefore, it appears that LAGERS is an agency which provides the means by which political subdivisions may provide for the retirement and pensioning of officers and employees. Consequently, LAGERS is an instrumentality of the State of Missouri and/or its political subdivisions--it not being necessary to distinguish for the purpose of this opinion between the state and its political subdivisions.

However, Section 105.300(7) does not include all instrumentalities of the state and/or its subdivisions but places the further limitation that the instrumentality must be a juristic entity which is legally separate and distinct from the state and its political subdivisions.

As to LAGERS being a juristic entity, the term "juristic entity" was discussed in Opinion No. 282, supra. There we stated:

". . . Webster defines juristic as 'relating to, created by, or recognized in law.' A juristic person is defined as 'a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties.' The word 'entity',

Honorable John C. Vaughn

just as is true with respect to the word 'instrumentality', has no all-inclusive definition. In Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A. 2d 697, 1.c. 698, it was said:

'So, too, "entity" is a word with elastic application. It is defined as something which has reality and distinctness of being; but that reality and distinctness may be either in fact or thought. (Webster's New International Dictionary)'"

Under Section 70.605-1, LAGERS is a body corporate with power to be sued in its own name, transact business and hold and dispose of property. Under the second paragraph of that section, the general administration and the responsibility for the proper operation of the system is vested in a board of trustees. Therefore, it is clear that LAGERS is a body recognized by law as having a distinct existence apart from the state and its subdivisions. Consequently, LAGERS is a juristic entity of the State of Missouri legally separate and distinct from the state and its political subdivisions.

Section 105.300(7) also requires, for the instrumentality to be included in the scope of that section, that the instrumentality's employees are not, by virtue of their relation to such juristic entity, employees of the state or one of its political subdivisions. Section 70.605-10 allows the board of trustees of LAGERS to hire employees. However, those employees are not compensated by the state or one of its political subdivisions, but by LAGERS itself out by its income-expense fund authorized by Section 70.725, RSMo 1969. The state and its political subdivisions have no control over the number of employees the board of trustees of LAGERS might hire and has no obligation to compensate such employees. Therefore, such employees are not by virtue of their employment by LAGERS employees of the state or one of its political subdivisions as the term "political subdivision" is defined in Section 105.300(8).

From the foregoing, we conclude that LAGERS, for the purposes of the Social Security Act, is an instrumentality of the State of Missouri and/or one or more of its political subdivisions.

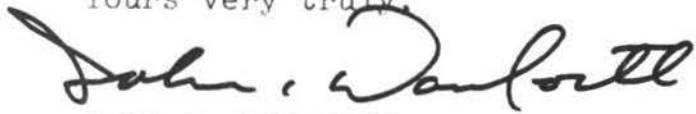
CONCLUSION

It is the opinion of this office that the Missouri Local Government Employees' Retirement System is an instrumentality of the state and/or one or more of its political subdivisions within the meaning of the Social Security Act.

Honorable John C. Vaughn

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

April 28, 1971

LETTER OPINION NO. 195

Colonel E. I. Hockaday
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Colonel Hockaday:

This opinion is in response to your letter asking this office to interpret Section 307.010 RSMo 1969. More specifically, you asked whether that Section may be violated before a load actually becomes dislodged and falls from a vehicle, and if so, what set of facts officers of the Highway Patrol should be prepared to testify to in order to prove a violation in court.

Section 307.010 RSMo 1969 provides:

"1. All motor vehicles, and every trailer and semitrailer operating upon the public highways of this state and carrying goods or material or farm products which may reasonably be expected to become dislodged and fall from the vehicle, trailer or semitrailer as a result of wind pressure or air pressure and/or by the movement of the vehicle, trailer or semitrailer shall have a protective cover or be sufficiently secured so that no portion of such goods or material can become dislodged and fall from the vehicle, trailer or semitrailer while being transported or carried.

"2. Operation of a motor vehicle, trailer or semitrailer in violation of this section shall be a misdemeanor, and any person convicted thereof shall be punished as provided by law."

It is clear on the face of the statute that the actual discharge of material from a motor vehicle, trailer or semitrailer is not a necessary element of a violation of the statute. What is necessary is a reasonable expectation that material may become discharged.

Colonel E. I. Hockaday

The statute in question provides that a violation occurs when the following facts are present: (i) the vehicle, trailer, or semi-trailer must be operating upon the public highways of this state. This means, that the vehicle in question must be in operation on a public highway. It does not constitute a violation if the vehicle is parked, or if it is operated on private property. See State v. Bartlett, 394 SW2d 434 (Springfield Ct.App. 1965); (ii) the vehicle must be carrying goods "which may reasonably be expected to become dislodged and fall from the vehicle" as a result of wind or air pressure or movement of the vehicle, and (iii) all or a part of the load must be susceptible to becoming dislodged by reason of the absence of a protective cover or other means of securing the load.

Whether or not the material being transported "may reasonably be expected to become dislodged" is a question of fact which must be determined on a case by case basis. Similarly, whether a protective cover is being used, or the load is sufficiently secured is a question of fact. There are no rules of law that can be firmly applied to resolve these questions.

We would suggest that a rule of reason be applied, and that the practical test should be whether an ordinarily prudent man would expect wind or air pressure, or vehicle movement to dislodge the material.

Very truly yours,

JOHN C. DANFORTH
Attorney General

April 21, 1971

Answer by letter-Mansur

OPINION LETTER NO. 197



Mr. Richard M. Miller, Secretary
Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri 63103

Dear Mr. Miller:

This is in response to your request for an opinion from this office regarding the authority of the St. Louis Police Officers Association to propose legislation or modification of legislation and in lobbying before the state legislature concerning salaries and fringe benefits for the police, and whether the association must have prior approval of the Board of Police Commissioners before engaging in such activities.

We are enclosing herewith Letter Opinion No. 144 issued by this office on March 6, 1970, to Honorable Leon M. Jordan, State Representative, Kansas City, Missouri, which we believe answers the first three questions you have submitted.

In answer to your question whether the St. Louis Police Officers Association must obtain prior approval of the St. Louis Police Board before engaging in such activities, it is our opinion that it does not need prior approval. If the Police Board is required to obtain prior approval before engaging in such activities, the Board of Police Commissioners in denying it such rights, would in effect prevent it from exercising the authority it is legally entitled to exercise.

Mr. Richard M. Miller

We trust this answers the questions you have submitted, and if you have any further questions, please feel free to submit them.

Yours very truly,

JOHN C. DANFORTH
Attorney General

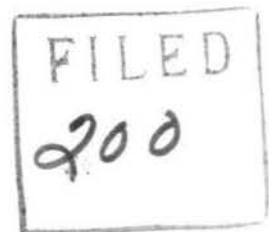
Enclosure: Op. No. 144
3-6-70, Jordan

Answer by letter-Wieler

OPINION LETTER NO. 200

March 30, 1971

Honorable Don Randall
Representative, District 82
Room 403A, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Randall:

In response to your opinion request as to whether county clerks preparing the county financial statement for 1970 should receive additional compensation, we are enclosing Opinion No. 409, issued October 9, 1969, to the Honorable Haskell Holman, which we feel answers the question raised.

As you will note, Opinion No. 409 holds that after January 1, 1971, county clerks are not entitled to any compensation for preparation of county financial statements.

Inasmuch as Section 50.800, sub. 1, RSMo 1969, provides that financial statements are to be prepared on or before the first Monday in March of the current year for the year ending December 31 of the preceding year, it is our opinion that county clerks are not entitled to additional compensation for preparing the 1970 county financial statement, which could not have been prepared prior to January 1.

Yours very truly,

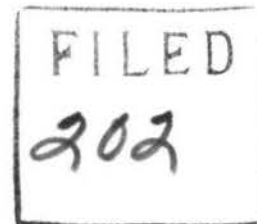
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 409
10-9-69, Holman

April 9, 1971

Answer by letter-Wood

OPINION LETTER NO. 202



Honorable Dee Wampler
Prosecuting Attorney
Greene County Court House
Springfield, Missouri 65802

Dear Mr. Wampler:

You have requested my opinion on whether a county or city can expend public funds, or incur indebtedness through the issue of general obligation bonds, for the purchase and installation of emergency public warning siren systems. We are directed by statute to give our written opinion to, among others, any prosecuting attorney ". . . upon any question of law relative to . . . [his] . . . offices or the discharge of . . . [his] . . . duties." (Section 27.040, RSMo 1969). We are not aware that you as a prosecuting attorney have any duties with regard to an expenditure of city funds or to the incurring of municipal indebtedness. We will, therefore, limit this opinion to a consideration of county expenditures and indebtedness.

We deem the following constitutional and statutory provisions pertinent to your inquiry:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and . . . under power granted to them by the general assembly for county, . . . purposes." (Article X, Section 1, Constitution of Missouri, 1945)

"Any county, . . . [by two-thirds vote] . . . may become indebted . . . for state or county purposes, . . ." (Article VI, Section 26(b), Constitution of Missouri, 1945; see Section 108.010, RSMo 1969)

Honorable Dee Wampler

"Any county . . . [by two-thirds vote] . . . may incur an additional indebtedness for county . . . purposes . . ." (Article VI, Section 26 (c), Constitution of Missouri, 1945; see Section 108.020, RSMo 1969)

The civil defense laws of the state authorize counties to appropriate and expend funds and obtain and distribute equipment, materials and supplies for civil defense purposes. They are further authorized to direct and coordinate the development of disaster plans and functions in accordance with the policies and plans of the federal and state disaster and emergency planning (Section 44.080(2), RSMo 1969). The law defines "civil defense functions" as those ". . . functions required to prepare for and carry out actions to prevent, minimize and repair injury and damage due to disasters, . . ." (Section 44.010(2), RSMo 1969). "Disasters" include those resulting from ". . . enemy attack, sabotage, or other hostile action, or from fire, flood, earthquake, or other natural causes;" (Section 44.010(3), RSMo 1969).

A federal civil defense guide entitled Federal Contributions for Civil Defense Equipment promulgated by the office of Civil Defense, Department of Defense in January 1970 lists (p. 59) warning devices, such as sirens, and the mechanisms which activate them as eligible for federal financial contributions. We further believe that warning sirens may properly serve the purpose of preventing or minimizing personal injury or property damage during time of disaster and would therefore be equipment that a county could obtain within the contemplation of the civil defense law.

Accordingly, we are of the opinion that a county of this state may properly expend public funds for the purchase of emergency public warning siren systems, and that a county may incur general obligation bond indebtedness for such purpose.

Yours very truly,

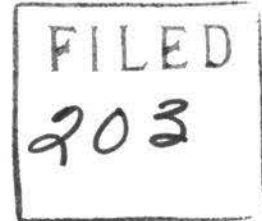
JOHN C. DANFORTH
Attorney General

COUNTY FINANCIAL
STATEMENT:
COUNTY COURT:

The cost of preparation and publishing the financial statement as required in Section 50.800 and 50.810, RSMo 1969, is to be paid by the county and the cost thereof not to be pro-rated to the various funds.

OPINION NO. 203

May 10, 1971



Honorable Claude R. Blakeley
State Representative
One Hundred Thirty-sixth District
Room 235B, State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Blakeley:

This is in answer to your request for an opinion from this office asking whether the county court is to pay out of each fund included in the county financial statement an amount in the proportion that the space used for each fund in such statement bears to the total cost of preparing and publishing such statement.

Section 50.800, RSMo 1969, provides in part:

"1. On or before the first Monday in March of each year, the county court of each county shall prepare and publish in some newspaper of general circulation published in the county, if there is one, and if not by notices posted in at least ten places in the county, a detailed financial statement of the county for the year ending December thirty-first, preceding.

"2. The statement shall show the bonded debt of the county, if any, kind of bonds, date of maturity, interest rate, rate of taxation levied

Honorable Claude R. Blakeley

for interest and sinking fund and authority for the levy, the total amount of interest and sinking fund that has been collected and interest and sinking fund on hand in cash.

"3. The statement shall also show separately the total amount of the county and township school funds on hand and loaned out, the amount of penalties, fines and forfeitures collected during the year and turned into the permanent school fund, the name of each person who has a loan from the permanent, school fund, whether county or township, the amount of the loan, date loan was made and date of maturity, description of the security for the loan, amount, if any, of delinquent interest on each loan.

"4. The statement shall show the total valuation of the county for purposes of taxation, the highest rate of taxation the constitution permits the county court to levy for purposes of county revenue, the rate levied by the county court for the year covered by the statement, division of the rate levied among the several funds and total amount of delinquent taxes for all years as of December thirty-first.

"5. The statement shall show receipts into each and every fund separately. First, from the general tax book; second, from railroad tax book; third, from billiard and other table licenses; fourth, ferry licenses; fifth, from land back tax books; sixth, from personal delinquent lists; seventh, fines and penalties; and eighth, from other sources. The total receipts for the year into all funds shall be shown in the recapitulation.

"6. Disbursements shall be shown in detail and every warrant issued shall be shown separately except as herein

Honorable Claude R. Blakeley

expressly provided. Date of warrant, number, person to whom issued and purpose for which issued shall be shown. Under separate heading in each fund the statement shall show what warrants have been paid (or to pay which funds were in the hands of the county treasurer as of December thirty-first) and under a separate heading what warrants are outstanding and unpaid for the lack of funds on that date with appropriate balance or overdraft in each fund as the case may be.

"7. Warrants for salaries of persons drawing yearly pay shall be brought into one call in the following form:

"Warrants No. ... etc., dated ... etc., salary of (name of person, title of office or employment, rate of pay and total amount of warrants issued).

"If part are paid and part unpaid the paid and unpaid warrants shall be listed separately under proper heading, as heretofore provided.

"8. Warrants issued to pay for the service of election judges and clerks of elections shall be in the following form:

"Warrants Nos. ... to ... inclusive, pay judges and clerks of elections at \$... per day (listing the names run in and not listing each name by lines, and at the end of the list of names giving the total of the amount of all the warrants issued for such election services.)

"9. Disbursements by road districts shall show the warrants, if warrants have been issued. If money has been disbursed by overseers the financial statement shall show the total paid by the overseer to each person for the year, and the purpose of each payment. If the payment was for labor it shall show the number of days each person worked during the year, the rate and the total amount

Honorable Claude R. Blakeley

paid to each person during the year. Each road district shall be shown separately and the status of receipts and disbursements for each district for the year shall be shown. Statements of special road districts shall be included in the county financial statement in the form in which the statements were submitted to and approved by the county court. Receipts into the county distributive school fund shall be listed in detail, disbursements shall be listed and the amount of each disbursement. If any taxes have been levied by virtue of section 12(a) of article X of the Constitution of Missouri the financial statement shall contain the following:

"By virtue and authority of the discretionary power conferred upon the county courts of the several counties of this state to levy a tax of not to exceed 35 cents on the \$100 assessed valuation the county court of ... county did for the year covered by this report levy a tax rate of ... cents on the \$100 assessed valuation which said tax amounted to \$... and was disbursed as follows:

"The statement shall show how the money was disbursed and if any part of the sum has not been accounted for in detail under some previous appropriate heading the portion not previously accounted for shall be shown in detail. . . ."

Section 50.810, RSMo 1969, provides in part that the publisher shall file two proofs of publication with the county court and the county court shall not pay the publisher until said proof of publication is filed with the county court. It further provides:

"2. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record."

Honorable Claude R. Blakeley

This section was enacted in 1969. Prior to that time, Section 50.810, RSMo 1959, subsection 2 provided as follows:

"2. The statement shall be spread on the record of the court and for this purpose the publisher shall be required to furnish the court with at least two copies of said statement that the same may be pasted on the record. For the preparation of the copy for the statement the court may allow a sum not less than ten cents and not to exceed thirty cents for every hundred words and figures, which sum, if allowed to the clerk of the court, shall be in addition to the salary or fees allowed him by law, and no pay shall be allowed for pasting a printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor; provided, any part not properly chargeable to any specific fund shall be paid from the fund from which officers salaries are paid."

When Section 50.810, RSMo 1959, was repealed in 1969 and reenacted, that portion of the statute which provided for the cost of preparation and publishing said financial statement was to be pro-rated to the several funds was omitted.

The rule in construing statutes when matters are omitted is stated in 82 C.J.S. §328 as follows:

"Since the court in construing a statute must ascertain and give effect to the legislative intent as expressed in the language of the statute, as a general rule the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted. It has been held to make no difference that the omission resulted from inadvertence, or because

Honorable Claude R. Blakeley

the case in question was not foreseen or contemplated, or that as a result of the omission the statute is a nullity. . . ."

The legislature is presumed to know prior construction of an original act, an amendment substituting a new phrase for one previously construed generally indicates an intention that a different interpretation be given the new phrase. Salitan v. Carter, Ealey and Dinwiddie, 332 S.W.2d 11 (1960). It is presumed the legislature knows the existing law and seeks to make some change when it enacts a statute. Reed v. Goldneck, 112 Mo.App. 310, 86 S.W. 1104.

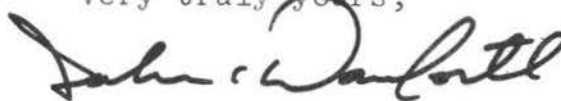
It is the opinion of this office that when the legislature repealed Section 50.810, RSMo 1959, and enacted Section 50.810, RSMo 1969, and omitted a provision of the statute which provided for pro-rating the cost of the preparation and publishing of the financial statement to the various funds, it was its intention that the cost thereof should no longer be pro-rated to the various funds. As it is the duty and responsibility of the county court to prepare and have printed the financial statement, it is the responsibility of the county to pay the cost thereof.

CONCLUSION

It is the opinion of this office that the cost of preparation and publishing the financial statement as required in Section 50.800 and 50.810, RSMo 1969, is to be paid by the county and the cost thereof not to be pro-rated to the various funds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,



JOHN C. DANFORTH
Attorney General

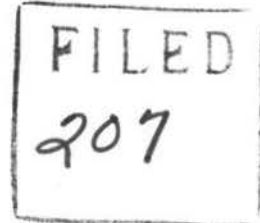
PODIATRY:

Determining the proper arch support needed to make a shoe fit properly and placing such support in the shoe does not constitute the practice of podiatry by a shoe salesman.

OPINION NO. 207

May 20, 1971

Honorable R. Max Humphreys
Prosecuting Attorney
Grundy County
705 Main Street
Trenton, Missouri 64683



Dear Mr. Humphreys:

This is in response to your request for an opinion on the question whether a shoe salesman unlawfully practices podiatry when, as an aid to selling his merchandise, he recommends the size and type of arch supports needed, and places the arch supports in the shoes to make the shoes fit properly.

In Chapter 330, RSMo 1969, the legislature has considered podiatry to be independent of medicine or surgery or any other branch of the healing arts. Section 330.010, RSMo 1969, provides that "the definitions of the words 'chiropody' and 'podiatry' shall be synonymous and interchangeable and, for the purpose of such chapter, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith. . . ." Section 330.020, RSMo 1969, provides that ". . . no one shall practice chiropody in this state unless duly licensed and registered as provided by law." Section 330.220, RSMo 1969, provides that "any person who shall practice chiropody in this state without having registered as provided in this chapter shall upon conviction be adjudged guilty of a misdemeanor." Section 330.200, RSMo 1969, is as follows:

"It shall be deemed prima facie evidence of the practice of chiropody, or of holding oneself out as a practitioner within the meaning of this chapter, for any person to treat in any manner the human foot by medical, mechanical or surgical methods, or to use the title 'chiropodist' or 'registered chiropodist', or any other words, or letters, which designate, or tend to designate, to the public that the person so treating or holding himself or herself out to treat, is a chiropodist."

Honorable R. Max Humphreys

It is apparent that the salesman described in your opinion request does not treat the human foot by medical or surgical methods nor does he hold himself out as a practitioner of podiatry. The question whether a shoe salesman who determines what size arch support would be needed to make the shoe fit properly is a practitioner of podiatry apparently has not been presented to an appellate court in Missouri.

In the case of People v. Dr. Scholl's Foot Comfort Shops, Inc., 13 N.E.2d 750, 753, the Court of Appeals of New York decided a case in which it was alleged that Dr. Scholl's Foot Comfort Shops, Inc. was unlawfully practicing podiatry.

The court stated the facts as follows, l.c. 751-752:

"The defendant sells, in addition to shoes, accessories such as arch and ankle supports, pads, and plasters. In fitting shoes, its salesmen are trained to use a mechanical device known as a pedograph. This registers an imprint which reveals the outer physical characteristics of the feet of the customer and, when read by the salesman, enables him to determine with greater accuracy the proper width, length and size of the shoe or arch support, if one is required. No charge is made for this service. The appellant states that this pedograph has been used by it for many years, and that it is used by a number of shoe stores throughout the country, and by hygiene and physical education departments in government institutions, hospitals, schools and colleges.

"Two special investigators, employed by the State Department of Education, visited the premises of the defendant, ostensibly for the purpose of purchasing shoes, but in reality to obtain evidence for this suit. Upon entering, the salesman took a pedograph imprint of the feet of one of the investigators, and in response to a question by this investigator, the salesman told her that the prints showed that she had a weak metatarsal, that her toes curved under, and that she needed arch supporters in order to receive the maximum comfort from her shoes. In further answer to a question by the investigator, requesting information concerning perspiring feet, she was

Honorable R. Max Humphreys

told that this condition was traceable to weak feet, that her feet were in the 'third stage of weak feet,' and that she should take a course of treatments given by the licensed chiropodist, which treatments consisted of a chiropodic treatment and five vibratory massage treatments. . . . Thereafter, the investigator was again waited on by the shoe salesman, who took another pedographic imprint of her feet and made substantially the same remarks as on her prior visit; he advised the wearing of arches at all times, as her feet were in 'the third stage of flat feet.' . . ."

In ruling on the question whether such activity constituted the practice of podiatry, the court said, l.c. 753:

"We next consider whether the acts of the salesman constituted the practice of chiropody. Clearly the use of the pedograph as a mechanical aid in determining the proper size of the shoe required does not constitute the practice of chiropody. Whether the statements by the salesman, in answer to the inquiries of the customer, constituted a diagnosis, is a more difficult question. It would be an unreasonable and harsh construction of the statute to hold that it was intended to prohibit shoe salesmen from pointing out to customers the manifest abnormalities of their feet when questions are put to them by the customers. It is clear from the record that the salesman at no time held himself out as being a podiatrist or being able to practice chiropody. On the contrary, he referred the customers to the duly licensed chiropodist. Some of the salesman's remarks may have verged close to diagnosis, but we should not hold that a mere remark concerning an obvious fact or a loose use of language concerning a manifest abnormality constitutes practicing podiatry."

In the case of *Staley v. Board of Medical Examiners*, 240 P.2d 61, the District Court of Appeals, Second District, Division One, California decided a case in which it was alleged that a shoe store owner was unlawfully practicing podiatry. The court said, l.c. 61-62:

Honorable R. Max Humphreys

"For approximately twenty years plaintiff has been in the business of fitting and selling shoes. In connection therewith he has been manufacturing, recommending and selling corrective shoes and appliances for the human foot, to-wit: arch supports. He uses a conventional measuring rule to get the customer's shoe size, and with a pedograph he takes a footprint 'to get the curve of the arch.' With this information he proceeds to make a 'support to fit in the shoe, so the shoe fits better.' If the customer is not pleased with the supports, he is free to return them and get his money back."

The court further said, l.c. 62-63:

"In this connection, appellant points out that respondent testified at the trial that he never told his customers what was wrong with their feet, but had them try several samples of arch supports, and when one was found that was comfortable, he proceeded to make a pair to order. That, on the other hand, one of the investigators for the Board testified that respondent told her precisely what was wrong with her feet, to-wit: that the trouble was in the heel and a long arch; that the arch slid or rolled forward, causing the feet to be out of line, which was apt to result in backache or some sacroiliac trouble. And that the other investigator testified that respondent told her that her metatarsals were in bad shape and that 'whether you know it or not, you are a subject for neuritis because you are injuring the nerves, the nerve endings in your feet, by walking on these metatarsals.'"

The trial court held that there was no practice of podiatry by such conduct and held, l.c. 63, that the shoe store owner:

"... 'has the right * * * to recommend the purchase by prospective customers of corrective shoes and appliances * * * and in connection with such recommendation, to point out to such customers the manifest abnormalities of their feet and state to them his reasons for making such a recommendation; that such acts by plaintiff should not be interpreted and construed by

Honorable R. Max Humphreys

the defendant Board as a "diagnosis" in violation of section 2141 of the Business and Professions Code of the State of California.' . . ."

In affirming the holding of the trial court, the appellate court said, l.c. 63:

" . . . the [trial] court held that pointing out a manifest abnormality in a customer's feet, does not amount to a diagnosis. The evidence produced on behalf of respondent supports such a finding, even though the testimony of the investigators, if believed would have supported a different finding."

From the facts stated in your opinion request, it appears that all the salesman is doing is fitting the shoes and arch supports to the feet of his customers and selling them to such customers. By so doing, he is not treating, operating upon or prescribing for any physical ailment, injury or deformity of the feet.

The statute is penal in character and therefore must be strictly construed. It would be a strained construction of Chapter 330, particularly Section 330.200, to hold that the mere fitting of shoes to the feet of the customer, including parts of shoes such as arch supports, is the prescription for or recommendation of a mechanical appliance intended for the treatment of disease, injury or deformity of the feet.

CONCLUSION

It is, therefore, the opinion of this office that determining the proper arch support needed to make a shoe fit properly and placing such support in the shoe does not constitute the practice of podiatry by a shoe salesman.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



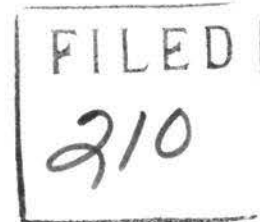
JOHN C. DANFORTH
Attorney General

*Opinion # 135-1970
should accompany
this opinion.*

April 9, 1971

Opinion Letter No. 210
Answered by letter-Klaffenbach

Honorable George P. Dames
Representative, District 104
Room 411B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Dames:

This letter is in response to your opinion request in which you forward certain questions posed by constituents.

The questions ask whether a county court has authority to give public utilities permission to install waterlines "in the ditch and adjacent to the roadway"; whether a certain road was established by the county or by the state and the dimensions and the time of the establishment of the roadway.

The latter part of your informant's letter presents certain questions concerning a specific controversy in which the county, a political subdivision of this state, is involved and for that reason such questions are not the proper subject of an opinion of this office.

Your first question asks whether the county can grant an easement to install utility lines in ditches constituting part of the right-of-way of a county road.

Under Section 49.270, RSMo 1969, the county court is authorized to "sell and cause to be conveyed any real estate, goods or chattels belonging to the county". And, in Odell v. Pile, 260 SW2d 521, the Supreme Court of Missouri held that this express grant included authority to grant an easement.

Section 229.100, RSMo 1969, which is mentioned in the correspondence attached to your request and which requires the assent of the county court before pipes can be laid states:

Honorable George P. Dames

"No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

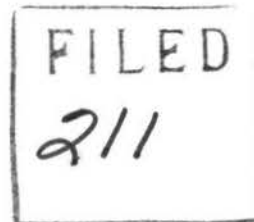
Therefore the county court has the power to hold land, to convey land, and to grant easements for pipeline purposes.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 20, 1971

Answered by Letter - Mansur
OPINION NO. 211



Honorable Bill J. Crigler
State Representative
One Hundred Sixteenth District
Room 313, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Crigler:

This is in response to your request for an opinion in part as follows:

"A Levee District organized under Chapter 245 RSMo. provides that a Board of Supervisors shall be elected to govern the District. Section 245.060 states in part that the landowners shall gather 'for the purpose of electing a Board of five supervisors, to be composed of owners of real estate in said District'. No other provisions of law are found which define the statute. A member of the Board of Supervisors of the South Howard Levee District is the owner of eighteen percent (18%) of the outstanding stock in a family owned corporate farm. The other stockholders of that corporation are his father, mother, brother, and sister. The family corporation of which he is an owner holds title to a substantial number of acres which are located within the confines of the Levee District and this person is actively engaged in farming that real estate. He does not

own any real estate in his own name which is located within the Levee District. All of the real estate in which he has an interest is held by the corporation in its corporate name.

"The questions presented are as follows:

"1. Does this member's eighteen percent (18%) interest in the family corporation qualify him as a landowner within the purview of Section 245.060? If it does not, can he legally serve on the Board of Supervisors?

"2. Is a family owned corporation, such as the one outlined above, entitled through its Board of Directors to appoint someone to stand in its shoes as a landowner and serve on the Board of Supervisors?"

Section 245.060, RSMo provides for the election of the board of five supervisors for levee districts organized under Chapter 245, RSMo. It provides for the circuit clerk of the court organizing that levee district to call a meeting of the owners of real estate or other property in the district to meet at a day and hour specified in some public place in the district:

". . . for the purpose of electing a board of five supervisors, to be composed of owners of real estate in said district, two of whom at least shall be residents of the county or counties in which said district is situate, or some adjoining counties; . . ."

Section 245.010, RSMo provides in part:

"2. The word 'owner' as used in sections 245.010 to 245.280 shall mean the owner of the freehold estate, as appears by the deed record, and it shall not include reversioners, remaindermen, trustees, or mortgagees, who shall not be counted and need not be notified by publication, or served by process, but shall be represented by the present owners of the freehold estate in any proceeding under sections 245.010 to 245.280."

Honorable Bill J. Crigler

According to the information you submit, the individual you inquire about owns 18% of the outstanding stock of a corporation that owns real estate in the district but does not own any real estate in the district in his own name. A stockholder of a corporation does not own any property that belongs to the corporation. Spurlock v. Missouri Pac. Ry. Co., 90 Mo. 199, 2 S.W. 219.

In answer to your first question, it is the opinion of this office that the ownership of 18% of the outstanding stock of a corporation which owns real estate in a drainage district does not qualify such person as an owner of real estate under the terms of the above statute and such person is not qualified to serve on a board of supervisors unless he owns real estate in his own name within the district.

In answer to your second question, it is our opinion, that the board of directors of a corporation cannot appoint someone to stand in its shoes as a landowner and serve on the board of supervisors of a drainage district. Under the above statute no person is qualified to serve on the board of directors of the levee district, unless he owns a free-hold interest in the real estate in his own name.

Very truly yours,

JOHN C. DANFORTH
Attorney General

*See also Hendrix v. Lock
482 SW 2d 427*

CRIMINAL LAW:
CRIMINAL PROCEDURE:
FINES:
PRISONERS:
JAILS:

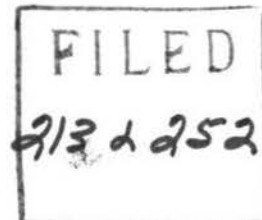
1. An indigent person may not be held in or committed to jail for failure to make immediate payment of a fine if he lacks the means to make such payment. 2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay. 3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment. 4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony. 5. Courts have authority to permit the payment of fines in installments. 6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine. 7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.

OPINION NOS. 213 and 252

October 27, 1971

Honorable James G. Baker
Representative, District 3
104 East 41st Street
Kansas City, Missouri 64111

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri 64469



Gentlemen:

This opinion is in response to your respective inquiries concerning the effect of the holding of the United States Supreme Court in Tate v. Short, 401 U.S.395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971).

Inasmuch as the questions involve similar problems, we have combined your requests into one opinion. The questions posed by Mr. Paden are:

"... 'How will the Magistrate Courts impose sentences and/or fines in case of traffic violations where the defendant alleges himself to be indigent and unable to pay a fine'.

"... 'Do the statutes of the State of Missouri permit the imposition of installment

Honorable James G. Baker
Honorable Robert B. Paden

finances and in the event that the defendant fails to meet one or more installments, who is responsible [sic] for the unpaid installment and what can the court do about it if the installment is unpaid'?"

The questions posed by Representative Baker are similar in content to the above.

First of all we wish to note that Senate Bill No. 227 of the 76th General Assembly effective September 28, 1971, repealed Sections 71.220 and 543.270, RSMo 1969, and enacted in lieu thereof two sections bearing the same number designations. The new legislation states:

"71.220. The various cities, towns and villages in this state, whether organized under special charter or under the general laws of the state, are hereby authorized and empowered to, by ordinance, cause all persons who have been convicted and sentenced by the mayor, judge of the police court, or other court having jurisdiction, for violation of ordinance of such city, town or village, whether the punishment be by fine or imprisonment, or by both, to be put to work and perform labor on the public streets, highways and alleys or other public works or buildings of such city, town or village, for such purposes as such city, town or village may deem necessary. And the marshal, constable, street commissioner, or other proper officer of such city, town or village, shall have power and be authorized and required to have or cause all such prisoners as may be directed by the mayor, or other chief officer of such city, town or village, to work out the full number of days for which they may have been sentenced, at breaking rock, or at working upon such public streets, highways or alleys or other public works or buildings of such city, town or village as may have been designated. And if the punishment is by fine, and the fine be not paid, then for every ten dollars of such judgment the prisoner shall work one day. And it shall be deemed a part of the judgment and sentence of the court that such prisoner may be worked as herein provided. When a fine is assessed for violation of an ordinance, it shall be within the discretion of the judge, or other official,

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assessing the fine to provide for the payment of the fine on an installment basis under such terms and conditions as he may deem appropriate.

"543.270. When any person shall be unable to pay any fine and costs assessed against him the magistrate shall have power, at the request of the defendant, to commute such fine and costs to imprisonment in the county jail, which shall be credited at the rate of ten dollars of such fine and costs for each day's imprisonment. When a fine is assessed by a magistrate, it shall be within his discretion to provide for the payment of the fine on an installment basis under such terms and conditions as he may deem appropriate."

Therefore, it is clear at the outset that installment payments are authorized by Senate Bill No. 227.

In analyzing the holding of the Supreme Court of the United States in Tate v. Short, we must first review the holding of the United States Supreme Court in Williams v. Illinois, 399 U.S. 235, 26 L.Ed.2d 586, 90 S.Ct. 2018 (1970).

In Williams v. Illinois, the court held that where the maximum term of imprisonment for petty theft was one year, the effect of the sentence imposed required appellant to be confined for 101 days beyond the maximum period of confinement fixed by the statute since he could not pay the fine and costs. The court held that where the aggregate imprisonment exceeded the maximum period of confinement fixed by statute, which resulted directly from an involuntary non-payment of a fine or court costs, there was an impermissible discrimination resting upon ability to pay.

In reaching this conclusion, the court stated at 399 U.S., 1.c. 241-242 et seq.:

"A State has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense. However, once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then

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subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

". . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment."

However, the court continued at l.c. 243-244 noting that:

"It bears emphasis that our holding does not deal with a judgment of confinement for non-payment of a fine in the familiar pattern of alternative sentence of '\$30 or 30 days.' We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

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And the court added by footnote:

"What we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. . . . Thus inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by the statute simply because of inability to pay."

Shortly after the Supreme Court decided the case of Williams v. Illinois, which we have quoted above, it also decided Morris v. Schoonfield, 399 U.S. 508, 26 L.Ed.2d 773, 90 S.Ct. 2232 (1970). In the Morris case the court per curiam vacated judgment and remanded for reconsideration on the basis of the Williams case. Four members of the court agreeing with the decision stated at 399 U.S., 1.c. 509:

"However, I deem it appropriate to state my view that the same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

"As I understand it, Williams v. Illinois does not mean that a State cannot jail a person who has the means to pay a fine but refuses or neglects to do so. Neither does it finally answer the question whether the State's interest in determining unlawful conduct and in enforcing its penal laws through fines as well as jail sentences will justify imposing an 'equivalent' jail sentence on the indigent who, despite his own reasonable efforts and the State's attempt at accommodation, is unable to secure the necessary funds. But Williams means, at minimum, that in imposing fines

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as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would otherwise automatically convert a fine into a jail sentence."

Returning to Tate v. Short, we note that the question under consideration involved an appeal from a corporation court in the State of Texas from fines accumulating \$425 on nine convictions. The corporation court under Texas law had no jurisdiction to impose prison sentences but committed the defendant to the municipal prison farm according to the provisions of a state statute and a municipal ordinance which required that the defendant remain there a sufficient time to satisfy the fines at the rate of five dollars for each day. The court stated at 401 U.S., 1.c. 397-398:

"Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.
. . ."

The court continued at 1.c. 399:

". . . Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. . . .

* * *

". . . Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."

It is clear from the foregoing that at this time the opinions of the Supreme Court of the United States prohibit the jailing of

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an indigent person for the involuntary nonpayment of a fine for a period in excess of the maximum period of confinement allowed by law (Williams v. Illinois); that an indigent cannot be jailed for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine (Morris v. Schoonfield); and, that where a state has legislated a "fines only" policy, the court cannot arbitrarily limit the punishment to payment of the fine if one is able to pay it yet convert the fine into a prison term for an indigent defendant. (Tate v. Short).

Thus, under Senate Bill No. 277 quoted above and the holdings of the Supreme Court of the United States, an indigent is to be offered the alternative of paying a fine in installments. The determination of indigency must be made after a hearing giving the accused an opportunity to show that he is unable to pay his fine and it is our view that the oral testimony of the defendant with respect to his indigency may satisfy his burden of proceeding in that respect. Obviously, a defendant who makes a false statement as to material facts concerning his inability to pay a fine may be subject to various sanctions.

With respect to the question concerning whether an indigent person may be imprisoned for the involuntary nonpayment of installments of a fine, we note that recent decisions in other states suggest divergent views. That is, in In Re Antazo, 473 P.2d 999 (1970) the Supreme Court of California stated that the proper use of imprisonment for nonpayment of a fine presupposes an ability to pay and a contumacious offender. On the other hand, in State v. De-Bonis, 276 A.2d 137 (1971) the Supreme Court of New Jersey after a lengthy analysis of the Williams case concluded that a fine was a part of the punishment and therefore an indigent could be imprisoned for involuntary nonpayment of installments.

Inasmuch as neither the Supreme Court of the United States nor the Supreme Court of Missouri have as yet resolved the question as to whether an indigent can be imprisoned for involuntary nonpayment of installments of a fine, we are of the view that we must leave that question to the courts.

CONCLUSION

It is the opinion of this office that:

1. An indigent person may not be held in or committed to jail for failure to make immediate payment of a fine if he lacks the means to make such payment.

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2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay.

3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment.

4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony.

5. Courts have authority to permit the payment of fines in installments.

6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine.

7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

PREVAILING WAGE LAW: The State Highway Commission cannot
STATE HIGHWAY COMMISSION: include in contracts for highway construction involving federal aid a provision as to wage determination by the Missouri Department of Labor and Industrial Relations during the period of the suspension of the Davis-Bacon Act and related federal acts pursuant to the presidential proclamation of February 23, 1971.

OPINION NO. 218

March 22, 1971



Mr. Robert L. Hyder
General Counsel
State Highway Commission
Jefferson City, Missouri 65101

Dear Mr. Hyder:

This is in answer to your recent request for an opinion from this office in which you ask whether contracts entered into by the State Highway Commission on which bids are opened after March 5, 1971, involving federal aid can contain the state statutory requirements that the contractor awarded the contract shall pay not less than the prevailing hourly rate of wages to all workmen performing work under the contract as determined by the Missouri Department of Labor and Industrial Relations.

Sections 290.210 to 290.340, RSMo 1969, constitute what is commonly referred to as the Prevailing Wage Law of Missouri.

Section 290.210(6), RSMo 1969, provides as follows:

"'Public body' means the state of Missouri or any officer, official, authority, board or commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds."

Section 290.210(7), RSMo 1969, provides in part as follows:

"'Public works' means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds.
. . ."

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Section 290.230, RSMo 1969, provides in part as follows:

"1. Not less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, and not less than the prevailing hourly rate of wages for legal holiday and overtime work, shall be paid to all workmen employed by or on behalf of any public body engaged in the construction of public works, exclusive of maintenance work. . . ."

Section 290.250, RSMo 1969, provides in part as follows:

"Every public body authorized to contract for or construct public works, before advertising for bids or undertaking such construction shall request the department to determine the prevailing rates of wages for workmen for the class or type of work called for by the public works, in the locality where the work is to be performed. The department shall determine the prevailing hourly rate of wages in the locality in which the work is to be performed for each type of workman required to execute the contemplated contract and such determination or schedule of the prevailing hourly rate of wages shall be attached to and made a part of the specifications for the work. The public body shall then specify in the resolution or ordinance and in the call for bids for the contract, what is the prevailing hourly rate of wages in the locality for each type of workman needed to execute the contract and also the general prevailing rate for legal holiday and overtime work. It shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rates to all workmen employed by them in the execution of the contract. The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen performing work under the contract. . . ."

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From the above statutory provisions it is clear that all contracts for construction of highways by the State Highway Commission must contain a provision that not less than the prevailing wages as determined by the State Department of Labor and Industrial Relations shall be paid to workmen by the contractors unless such requirement is abrogated or suspended by some other state or federal requirement.

On February 23, 1971, the President of the United States issued a proclamation suspending the provisions of the Davis-Bacon Act and other federal statutes requiring the payment of wages determined in accordance with the Davis-Bacon Act. Such proclamation provides in part as follows:

"Section 1 of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. 276a), provides:

' . . . every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there. . . .';

Various other acts provide for the payment of wages, with these provisions dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act.

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-- The Davis-Bacon Act and other acts dependent upon it frequently require contractors working on federally involved projects to pay

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the high negotiated wage settlements to mechanics and laborers, thereby sanctioning and spreading the high rates and thus inducing further acceleration contributing to the threat to the Nation's economy.

Section 6 of the Davis-Bacon Act provides:

'In the event of a national emergency the President is authorized to suspend the provisions of this Act.'

WHEREAS I find that a national emergency exists within the meaning of section 6 of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. 276a).

NOW THEREFORE, I, RICHARD NIXON, President of the United States of America, do by this proclamation suspend, as to all contracts entered into on or subsequent to the date of this proclamation and until otherwise provided the provisions of the Davis-Bacon Act of March 3, 1931, as amended, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;

And I do hereby suspend until otherwise provided the provisions of any Executive Order, proclamation, rule, regulation or other directive providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act;

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of February in the year of our Lord nineteen hundred seventy-one, and of the Independence of the United States of America the one hundred ninety-fifth.

RICHARD NIXON."

On March 1, 1971, the Solicitor of the United States Department of Labor issued a memorandum to all states' Attorneys General as to the effect of the suspension of the Davis-Bacon and related Acts by the presidential proclamation. Such memorandum stated in part:

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"The effect of that action was to remove from all federally involved construction contracts entered into on or after February 23, 1971, all otherwise applicable Federal requirements that laborers and mechanics be paid at least the wage rate determined by the Secretary to be prevailing for their crafts.

In addition, and as indicated in the attached memorandum, it is our judgment that all State-required wage standards provisions have been rendered inapplicable for the duration of such suspension to federally involved construction contracts on which the wage payment requirements of the Federal statutes and regulations have been suspended. . . ."

On March 1, 1971, William H. Rehnquist, an Assistant Attorney General of the United States issued a memorandum to the Solicitor of the United States Department of Labor concerning the effect of the suspension of the Davis-Bacon Act and related acts on state statutes providing for the inclusion in construction contracts of provisions as to payment of not less than prevailing wages. The memorandum stated in part:

"While the Davis-Bacon Act is not a preemptive statute in the broad sense of the word, it is our view that the suspension provision (40 U.S.C. 276a-5) does preclude a State from imposing its 'Davis-Bacon' requirements on construction otherwise subject to the Davis-Bacon Act or a Davis-Bacon extension statute. Any other conclusion would subvert the whole purpose of the suspension provision. If the States had the power locally to undo what the President has found necessary in the national interest, then the suspension provision would be rendered impotent. Such a result, in our opinion, would be illogical. If suspension has any meaning at all with respect to the construction contracts covered, it must mean that there will be no wage floor, federal or State, for the duration of the suspension."

It is clear that both the Solicitor of the United States Department of Labor and the office of the United States Attorney General have determined that the suspension of the provisions of the Davis-Bacon Act and other federal acts to which the Davis-Bacon Act applies have preempted the field of prevailing wages

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and, therefore, that during the period of suspension under the presidential proclamation, the State Prevailing Wage Laws have no validity or effect and cannot be followed or enforced by state agencies.

However, we deem it unnecessary for this office to determine whether the presidential proclamation has the effect of nullifying or suspending the State Prevailing Wage Law of Missouri because of action taken by the Federal Highway Administration of the United States Department of Transportation. The State Highway Commission of Missouri received March 5, 1971, a telegram from the Federal Highway Administration which stated:

"In addition to the deletions of the Davis-Bacon provisions as discussed in Swicks wire of 2/26 proposals for federal aid projects on which bids are opened after 3-5 must contain no wage determination made under the provisions of state statutes or other determination processes."

It is clear that no federal grants for highway construction will be made by the Federal Highway Administration if the contracts for such construction provide for payment in accordance with the Prevailing Wage Law as determined by a state agency when bids for such construction are opened after March 5, 1971.

The provisions of the Davis-Bacon Act are applicable to all federally assisted contracts for highway construction entered into by the Missouri Highway Commission under the provisions of Section 113 of Title 23 of the United States Code which provides in part as follows:

"(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Federal-aid systems, the primary and secondary, as well as their extensions in urban areas, and the Interstate System, authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 U.S.C. 267a)."

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Section 226.150, RSMo 1969, provides as follows:

"The [state highway] commission is hereby directed to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads of the Department of Agriculture, or other branch of the United States government, acting under the provisions of federal law in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction"

We believe that such provision authorizes and compels the State Highway Commission to eliminate from its contracts for highway construction, which are federally assisted, any requirement that no less than the prevailing wage as determined by the Department of Labor and Industrial Relations be paid the workmen by the contractors on such highway projects.

The Supreme Court of Missouri in the case of Logan v. Matthew, 52 S.W.2d 989, 330 Mo. 1213, ruled specifically as to the meaning of this provision. In that case, the Federal Bureau of Public Roads refused to approve the contribution of any federal highway construction funds toward the locating and construction of Missouri Route 65 through Livingston and Carroll counties if the route were constructed so as to go through the towns of Avalon and Tina. Section 8120, RSMo 1929, (now Section 227.020, RSMo 1969) contained the provision that Avalon and Tina were points through which such state highway must pass.

Section 8106, RSMo 1929, (now Section 226.150, RSMo 1969) provided that the State Highway Commission was directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States for highway construction, and to comply with any of the rules and conditions made with the Bureau of Public Roads or other branch of the United States government acting under the provisions of federal law, in order to secure to the State of Missouri funds allotted to this state by the United States government for highway construction.

Since Section 8120 provided that the state highway must go through two specific towns, and the federal authorities refused to grant highway construction aid unless the highway followed a route which did not go through the two towns, the Supreme Court

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was required to determine whether Section 8106 or 8120 prevailed. The Supreme Court held that the provisions of Section 8120, RSMo 1929, (now Section 226.150) prevailed. The Court said (l.c. 992):

"It appears clear from the provisions of this statute that the purpose of the Legislature was to secure all of the funds allotted to the state by the federal government for road construction, and in order to accomplish that result it directed the state highway commission to comply with any of the rules or conditions made by the federal government."

The dissenting opinion by two judges is also significant because such dissenting opinion recognized the fact that the majority opinion clearly held that the State Highway Commission was and is directed and obligated by Section 226.150 to comply with the requirements of any future federal laws and regulations applicable to federal aid for state highway construction. The dissenting opinion stated (l.c. 994):

"Furthermore, the direction is to comply with the provisions of any act of Congress governing the distribution and expenditure of federal road funds, and any rules and regulations of the bureau. This deprives the state highway commission of any discretion in the matter, and mandatorily obligates it to follow not only the present but any future federal laws and regulations on the subject."

In view of the fact that the Federal Highway Administration has officially informed the State Highway Commission of Missouri that the Federal Highway Administration will not make any payments on contracts for any highway construction projects of Missouri on which bids are opened after March 5, 1971, which contain any wage determination under state statutes, it is clear that the State Highway Commission is required by the provisions of Section 226.150 not to include in its contracts involving federal aid for highway construction any wage determination made by the Labor and Industrial Relations Commission until such time as the suspension of the Davis-Bacon Act and related acts by the presidential proclamation has ended.

CONCLUSION

It is the opinion of this office that the State Highway Commission cannot include in contracts for highway construction in-

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volving federal aid a provision as to wage determination by the Missouri Department of Labor and Industrial Relations during the period of the suspension of the Davis-Bacon Act and related federal acts pursuant to the presidential proclamation of February 23, 1971.

Very truly yours,

A handwritten signature in dark ink, reading "John C. Danforth". The signature is written in a cursive, slightly stylized script.

JOHN C. DANFORTH
Attorney General

March 30, 1971

Opinion Letter No. 219
Answered by letter (Klaffenbach)

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
415 West Main Street
Savannah, Missouri 64485



Dear Mr. Lance:

This letter is in response to your opinion request in which you ask the following question:

"May a Police Judge who is a lawyer and elected to the office in a Fourth Class City within a Judicial Circuit containing a Second Class County, serve as Deputy Juvenile Officer for the county in which the Fourth Class City of which he is the duly elected Police Judge?"

Additionally you refer to our Opinion No. 141, dated May 7, 1970 which was addressed to you and in which we held that prosecuting attorneys and sheriffs or other law enforcement officers occupied positions that are incompatible with and in conflict with the position of the juvenile officer under the juvenile act and therefore such officers may not serve as juvenile officers or deputy juvenile officers.

With respect to the question that you now pose we note that the police judge of such a city is, under the provisions of Section 98.510 RSMo. 1969, a conservator of the peace, and has exclusive original jurisdiction to hear and determine all offenses against the ordinances of the city.

Under Section 211.031 RSMo. 1969, pertaining to the jurisdiction of the juvenile courts we note that Subsection (1) (d) gives the juvenile court exclusive jurisdiction over a "child", as defined in that chapter, who is "alleged to have violated a state law or municipal ordinance" and further under Subsection (2) has jurisdiction concerning "any minor seventeen years of age or older who may be within the county, and who is alleged to have violated a state law or municipal ordinance prior to having become seventeen years of age".

Honorable Alden S. Lance

Under Section 211.041 RSMo. 1969, the juvenile court once having acquired jurisdiction of a child may retain jurisdiction for the purposes of Chapter 211 until he has attained the age of twenty-one years, with an exception, not pertinent here.

Section 211.071 RSMo. 1969, with respect to prosecutions under the general law states:

"In the discretion of the judge of the juvenile court, when any petition under this chapter alleges that a child of the age of fourteen years or older has committed an offense which would be a felony if committed by an adult, or that the child has violated a state or municipal traffic law or ordinance or that a minor between the ages of seventeen and twenty-one years over whom the juvenile court has jurisdiction has violated any state law or municipal ordinance, the petition may be dismissed and such child or minor may be prosecuted under the general law, whenever the judge after receiving the report of the investigation required by this chapter and hearing evidence finds that such child or minor is not a proper subject to be dealt with under the provisions of this chapter."

Clearly then under the last quoted section such a child who has allegedly violated a municipal ordinance may be prosecuted for such ordinance violation. The police judge who also serves as a deputy juvenile officer exercising the powers of the juvenile officer under Chapter 211 would be placed in the incompatible situation of acting as an arm of the state with respect to the state's parens patriae position with the juveniles and at the same time having the duty as police judge to pass upon cases of alleged ordinance violations which will from time to time involve such juveniles as are prosecuted under general law. In addition, although prosecution under general law is within the discretion of the judge of the juvenile court, no doubt the recommendations of the juvenile officer and his deputies will be given some consideration in the ultimate determination made by the juvenile court.

For these reasons and for the further reasons expressed in our prior opinion to you, it is our view that the office of such a police judge is incompatible with the office of juvenile officer or deputy juvenile officer.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 21, 1971

OPINION LETTER NO. 220
Answer by letter-Romines

Honorable James S. Stubbs
Prosecuting Attorney
Livingston County Courthouse
Chillicothe, Missouri 64601

Dear Mr. Stubbs:

This is in reply to your request for an opinion of this office concerning the recording of satisfaction of certain deeds of trust by the recorder of deeds of Livingston County, Missouri.

In your request you state that the recorder of deeds has been requested to satisfy certain deeds of trust without the production of the promissory note which secures those deeds of trust. Two situations have arisen which you state as follows:

"1. Where the obligee and holder of the promissory note does not wish to cancel the note, but simply wishes to release the security interest in the form of a Deed of Trust, can the Deed of Trust be released leaving the promissory note intact and if so by what method?

"2. Where the obligation secured by the Deed of Trust has been satisfied, can the obligee by Deed of Release, effect a complete release of the Deed of Trust without either producing the promissory note or making affidavit as is directed by Section 443.060 (2) RSMo 1969?"

The conclusions which we draw, relate strictly to the duties of the recorder of deeds, and thus the controlling provisions of Missouri law are Sections 443.060 and 443.090, RSMo 1969, as you have recognized in your opinion request. Those sections state:

"1. If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided.

"2. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the cestui que trust named in the mortgage or deed of trust desired to be released or his legal representatives, to make oath, in writing, stating that the note or other evidences of debt named in the mortgage or deed of trust sought to be released have been paid and delivered to the maker thereof or his representative, and the recorder shall also require the maker of such note or notes, or his legal representative, to make affidavit, in writing, that the note or notes in question have been paid, and cannot be produced because lost or destroyed, and that they are not then

Honorable James S. Stubbs

in the possession of any person having any lawful claim to the same; provided, however, that, if such note or notes shall not have been delivered to the maker or his legal representative, the affidavit so required of the cestui que trust or his legal representative shall recite that the note or other evidence of the debt named in said mortgage or deed of trust has been paid and cannot be produced because lost or destroyed, and that they are not then in the possession of any person having any lawful claim to the same, and the term 'legal representatives' as used in this section shall include assigns; and the affidavit of the maker of such note or notes or his legal representative shall recite that said note or notes have been paid; the affidavits so required shall be recorded in the same manner as deeds, in a permanent record, and the recorder shall make a notation upon the margin of the mortgage so satisfied giving the number of the book and page wherein said affidavit has been recorded; provided, that nothing in this chapter shall be so construed as to require that any interest coupon notes shall be produced and canceled in the presence of the recorder, but that all such interest coupon notes shall conclusively be taken and be deemed to have been paid in full, when the principal note described in the mortgage or deed of trust shall have been produced and canceled in the presence of the recorder as provided for in this chapter." (Emphasis ours)

Section 443.060

"In case any person desires to release any part of the property described in any deed of trust or mortgage by marginal record or deed of release, he shall be permitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits or otherwise as now or hereafter provided by law in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such deed of trust or, if such release is made by deed of release, shall note the fact of the filing for record of such partial release, and of the

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presentation of such notes or other obligations, or accounting therefor, on such notes or obligations in substantially the following form:

'See partial release dated _____ Recorder'

and on the margin of the record of such deed of trust or mortgage, but shall not cancel such notes or other obligations; and nothing in this section shall be construed as making it necessary for any trustee named in the mortgage or deed of trust to join in such partial deed of release." Section 443.090

As the emphasized portions of Section 443.060 set out above makes clear, when satisfaction is to be acknowledged by the payee, or assignee, or in case a full deed of release is offered for record, before the recorder of deeds, the note or notes secured shall be produced and canceled in the presence of the recorder; a requirement that the note or notes be produced and notation of partial release made on such note or notes by the recorder is to be found in Section 443.090. Quite clearly the presentation of the note or notes secured must be made before the recorder. These sections admit of one exception. If by affidavit, the cestui que trust, or his legal representative, states that the note or notes have been paid and have been lost or destroyed, the recorder may note satisfaction. See also in this regard Opinion of the Attorney General, No. 82, Short, 12-8-38, a copy of which is attached.

You have also forwarded a form deed of release which has been presented to the recorder for filing [attached as appendix A] and ask whether this purported deed of release may be filed. Our conclusion is that the presentation of such purported deed of release does not comply with the requirements of Section 443.060 because the notes have not been produced and no affidavit has been filed showing the notes have been lost or destroyed.

In view of the foregoing discussion, it is the opinion of this office, that, the recorder of deeds is without authority to make the requisite margin notations pursuant to Sections 443.060(1) and (2) and 443.090, RSMo 1969, dealing with the satisfaction of deeds of trust, or record full or partial deeds of release, absent the presentation of the note or notes secured by the deed of trust involved, or presentation of affidavit that the notes have been lost or destroyed.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 82
12-8-38, Short

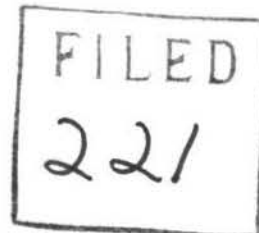
TAXATION (INCOME):

Interest received upon a promissory note executed by an individual borrower which note is guaranteed by the United States government is not exempt from Missouri state income tax under the provisions of Section 143.150, RSMo 1969, as interest upon the obligations of the United States or its possessions.

OPINION NO. 221

April 28, 1971

Honorable Robert Ellis Young
Representative, District 133
Room 203, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Young:

This official opinion is issued pursuant to the request contained in your letter concerning the status for Missouri state income tax purposes of interest received upon a promissory note guaranteed by the United States government.

More specifically, the question as presented by your letter is:

"I would like to know if the interest received upon a promissory note guaranteed by the United States government is tax exempt. . . ."

Section 143.150, RSMo 1969, relating to income tax provides as follows:

"The following income shall be exempt from the provisions of this chapter:

* * *

"(5) Interest upon the obligations of this state or of any political subdivision thereof, or upon the obligations of the United States or its possessions;"

The language used in providing an exemption from Missouri income taxation of interest received upon the obligations of the United States is substantially the same as the exemption of certain obligations contained in the federal statute.

Section 103 of the Internal Revenue Code of 1954 states:

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"Gross income does not include interest on--

"(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or the District of Columbia;

"(2) the obligations of the United States; . . ."
(issued before September 1, 1917 or otherwise expressly provided for)

The term "interest upon the obligations of the United States" as used in these income tax statutes has been defined by the courts to mean interest received on obligations issued by the federal or state governments or political subdivisions thereof in connection with the borrowing power of such governmental entities. It does not exempt interest paid on every type of contract or legal liability incurred by such governmental authority. In *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 79 L.Ed. 211, the question was considered as to whether interest received from the federal government on a tax refund was exempt on the basis that it was paid by reason of an obligation of the United States. The court held the interest taxable saying:

". . . It is clear from a consideration of the entire section and of the subject matter that the purpose of Congress, in thus excluding from gross income interest upon such obligations, was to aid the borrowing power of the Federal government by making its interest-bearing bonds more attractive to investors. . . . The scope of the word 'obligations' as there employed must be narrowed accordingly, and not extended to include interest upon indebtedness not incurred under the borrowing power, as the court in the *American Viscose Case* properly held. . . ."

In the case of *Holley v. United States*, 124 F.2d 909 (C.C.A. 6th), the court reviewed the federal statute exempting interest received upon the obligations of a state, territory or any political subdivision thereof, and in the opinion it was stated:

"The statute does not exempt interest paid on every type of contract or legal liability incurred by a municipal corporation. This was the holding of the Court of Claims with reference to the same project and to two contracts identical with that involved herein. . . . The court there declared that Congress in enacting

Honorable Robert Ellis Young

the statute involved did not intend to exempt interest on all types of municipal obligations but only such interest as accrued on debts incurred under the borrowing power of the city. Since the obligation entered into by the city of Detroit was incurred under the power of eminent domain, the court held that the interest was not exempt within the meaning of the Act. . . . Moreover, it follows the settled law upon this point. . . . As stated in the American Viscose Corp. case, Congress established the exemptions in this section of the statute to aid in the flotation of government bonds and securities by making them tax free, and therefore more attractive to investors. Hence the court concluded that the statute should not be so broadly construed as to cover a transaction which has no relation to the flotation of securities. This holding was expressly approved in *Helvering v. Stockholms Enskilda Bank*, supra, which declared that the predecessor of this section, identical, so far as this question is concerned, with the statute now considered, had been written to make attractive investment in the obligations of the United States, and therefore should be interpreted narrowly so as to exempt nothing more than Congress clearly intended to be exempted."

See also *American Viscose Corporation v. Commissioner of Internal Revenue*, 56 F.2d 1033; *Baltimore & O. R. Co. v. Commissioner*, 78 F.2d 460; *United States Trust Co. v. Anderson*, 65 F.2d 575.

The facts related in the letter requesting an opinion relate to interest received on a promissory note issued by a private citizen payable to another private citizen and guaranteed by the United States government pursuant to F.H.A. authority. It is clear that the obligation upon which interest is being paid is that of an individual primarily and only indirectly in the case of default that of the United States. Beyond that it is clear that this obligation was not issued under the borrowing power of any governmental authority. Under these circumstances, the interest received by a taxpayer on such a note is not exempt from Missouri state income tax.

CONCLUSION

It is the opinion of this office that interest received upon a promissory note executed by an individual borrower which note is

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guaranteed by the United States government is not exempt from Missouri state income tax under the provisions of Section 143.150, RSMo 1969, as interest upon the obligations of the United States or its possessions.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

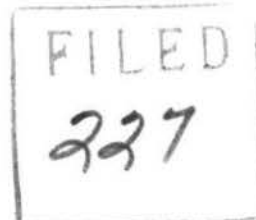
ASSESSMENTS:
COMPENSATION:
COUNTY OFFICERS:
STATE TAX COMMISSION:

The assessed valuation of real and tangible personal property for Sullivan County for the year 1970 is \$19,637,081.

OPINION NO. 227

April 2, 1971

Honorable N. William Phillips
Prosecuting Attorney
Sullivan County
103 North Market
Milan, Missouri 63556



Dear Mr. Phillips:

This is in response to your request for an opinion concerning the figure for assessed valuation to be used by Sullivan County in 1970 to determine the rate of compensation for county officials. As indicated in your letter, the figure for the total assessed valuation for Sullivan County in 1970 of real and tangible personal property, as prepared by the State Tax Commission for inclusion in the Missouri Roster of State, District and County Officers as published by the Secretary of State's Office, is \$20,156,071.

However, in preparing this total, the figure of \$518,990 which represents the valuation assessed to the Chicago, Burlington & Quincy Railroad Company in Sullivan County for the year 1967 was inadvertently included. Prior to 1970, the 1967 valuation of the Chicago, Burlington & Quincy Railroad Company property was under legal dispute and had never been finally assessed.

Therefore, this figure must be subtracted from the total listed in the Missouri Roster in order to arrive at the proper assessed valuation for Sullivan County for the year 1970.

CONCLUSION

It is, therefore, the opinion of this office that the assessed valuation of real and tangible personal property for Sullivan County for the year 1970 is \$19,637,081.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 29, 1971

OPINION LETTER NO. 228

Answer by Letter Klaffenbach

Honorable James E. Godfrey
Missouri House of Representatives
State Capitol Building - Room 308
Jefferson City, Missouri 65101



Dear Representative Godfrey:

This letter is in answer to your opinion request in which you ask:

"Would you kindly render an Attorney General's Opinion on the proposition as to whether or not a duly elected State Official can give away, transfer, or otherwise dispose of property or assets of his office without complying with the statutory provisions for the disposal of same; or, can he give away, transfer, or otherwise dispose of property or assets of his office at his pleasure?"

The obvious answer to your question as thus phrased is clearly that a state officer must comply with state statutes and that state property cannot be disposed of according to the whim of the officer in charge of such property.

In particular, however, we understand that your question is directed to the current controversy concerning the transfer of postage stamps to the State Senate by the Auditor. The facts with respect to this controversy as we understand them are that the State Auditor found stamps valued at approximately \$31,000 after he took office in January, 1971 and that he then determined that the same were in excess of the needs of his office and also concluded that he could not dispose of the stamps by return to the United States Post Office or by sale to the public. We also understand that the Auditor then conferred with the Governor on about the second day of his term of office and a joint decision was reached concluding that some of the stamps should be transferred to the State Senate and to the House of Representatives.

Honorable James E. Godfrey

March 29, 1971

It is further our understanding that, in accordance with the views of the Governor, stamps in the approximate amount of \$4,000 were transferred to the State Senate. Thereafter, we understand, the Governor called the State Auditor and requested that additional stamps be transferred to the House of Representatives.

In order to answer your question fully it would be necessary to pass upon the propriety of the transfer by the State Auditor, the propriety of the action of the Senate in accepting such transfer, and, additionally, the propriety of the action of the Governor and any other state officers who may have been involved in the transfer. In these premises it is clear that the question involves a controversy concerning the past actions of numerous officers of both the Executive and Legislative branches of the government. As such it is not a proper subject of an opinion of this office under Section 27.040 R.S.Mo. 1969, and for this reason and for the reason expressed below and because our opinion under these circumstances would serve no useful purpose we must respectfully decline to answer your question.

At the same time however we believe that the question takes on the character of mootness because we understand that the stamps have not been expended and are being held in trust by the Senate for the State Auditor pending a determination concerning ultimate disposal. Thus the stamps have not been given away or disposed of by the Auditor and we have a collateral question with respect to their disposal.

We find no statutory provision authorizing the State Purchasing Agent to transfer surplus property to the legislative branch of the state government. However, under Section 34.140 R.S.Mo. 1969 he has the power to transfer surplus from any department of the state where it is not needed to any other department where it is needed. It is therefore our view that the Auditor may declare the stamps to be surplus property for disposal by the Purchasing Agent.

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 6, 1971

Answer by letter-Gardner

OPINION LETTER NO. 229

Honorable John W. Briscoe
Prosecuting Attorney
Knox County Courthouse
Edina, Missouri 63537



Dear Mr. Briscoe:

We have received your letter in which you ask whether a county clerk can and should mail absentee ballots to persons whose applications are received not later than 4 p.m. on the fourth day before the election when absentee ballots are not delivered to the county clerk until after such time.

Under Section 112.020, RSMo 1969, to which you refer, it is optional with the voter to apply for an absentee ballot either in person or by mail. Section 112.020, RSMo 1969, states that "... The application made in person shall be made not later the four p.m. of the day before the election. The application made by mail shall be received not later than four p.m. on the fourth day before the election. . . ."

When voting by mail, Section 112.050, RSMo 1969, provides that after the marked ballot has been securely sealed in an envelope "... The envelope shall be sent by mail by the voter, postage prepaid, to the election authority. For the ballot to be eligible to be counted the envelope containing it shall be received by the election authority not later than four p.m. of the day before the election. . . ."

We agree with you, therefore, that an application made by mail must be received not later than 4 p.m. on the fourth day before the election.

This requirement has no application to the furnishing of a ballot by the clerk. The clerk has a ministerial duty to furnish

Honorable John W. Briscoe

absentee ballots which have been legally applied for as quickly as can reasonably be done. If the voter's ballot is not received until after 4 p.m. of the day preceding the election, such ballot is void and shall not be counted but this does not authorize the county clerk to decide that he will not mail out ballots in response to applications because he believes that the ballot cannot be returned by the voter before 4 p.m. of the day preceding the election. It is the duty of the county clerk to mail out absentee ballots as quickly as possible to those persons whose applications have been received before 4 p.m. of the fourth day before the election.

Yours very truly,

JOHN C. DANFORTH
Attorney General

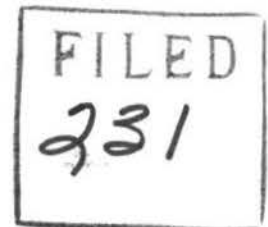
LABOR:
FEMALE LABOR:

1. Title VII of the Civil Rights Act of 1964 barring discriminatory employment practices with respect to woman workers has superseded Section 290.040, RSMo 1969, limiting the hours of labor of women employed by employers subject to the provisions of the federal act. 2. Those employers not covered by the provisions of Title VII of the Civil Rights Act of 1964 will remain subject to the maximum hours limitation of Section 290.040, RSMo 1969, and the Division of Industrial Inspection will continue to have the responsibility of enforcement in accordance with Section 290.070, RSMo 1969.

OPINION NO. 231

November 11, 1971

Honorable John D. Schneider
Senator, District 14
1185 Penhurst
Florissant, Missouri 63033



Dear Senator Schneider:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"I would appreciate your rendering an opinion of the constitutionality of 290.040 RSMo restricting hours of employment by females in Missouri.

* * *

"If you should issue an opinion that Section 290.040 RSMo is unconstitutional, do you believe that the Missouri Division of Industrial Development would be relieved of enforcing this statute?"

We will first consider the issue as to the constitutionality of the Missouri statute. In this regard, the provisions of Section 290.040, RSMo 1969, are as follows:

"1. No female shall be employed, permitted or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the diverse kinds of

Honorable John D. Schneider

establishments and places of industry herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year, and operators of floral establishments shall be exempted from the provisions of this section on certain holidays, namely: Mother's Day, Valentine's Day, Easter and Christmas and on occasions for funerals and weddings, not to exceed three days in any calendar week or a total of thirty days in any calendar year, and telephone companies shall be exempt from the nine hours during any one day provision of this section.

"2. Nothing in this section shall be construed to apply to telephone companies serving under seven hundred fifty stations, or to telephone companies in cases of emergency."

In addition to the above Missouri legislation, Section 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000e-2a) provides:

"(a) It shall be an unlawful employment practice for an employer--

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, . . . or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex, . . ."

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Section 703(e) of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000e-2e) also provides in part as follows:

"Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . ."

The provisions of the federal act are administered by the Equal Employment Opportunity Commission. On December 2, 1965, the Equal Employment Opportunity Commission promulgated "Guidelines on Discrimination Because of Sex," and Section 1604.1 (30 F.R. 14927) provides in part:

"(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

"(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in

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cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. . . ."

In Missouri Attorney General Opinion No. 45, Walsh, 1-31-67, it was held that laws relating to female labor, Section 290.040, RSMo, and the related special treatment laws, Sections 292.040, 293.060 and 564.680, RSMo, were not inconsistent with the Federal Civil Rights Act of 1964 and not invalidated. The opinion quoted extensively from the EEOC Guidelines on Discrimination Because of Sex and concluded that the Equal Employment Opportunity Commission recognized the validity of state protective legislation. It was further concluded that the Missouri statutes had been enacted for the public interest, specifically the protection of the working woman, and that they were a bona fide occupational qualification falling within the exception to the general prohibition of discrimination against women in hiring by sex as set forth in the Civil Rights Act of 1964.

On August 19, 1969, the Equal Employment Opportunity Commission amended its Guidelines and Section 1604.1 (34 F.R. 13368) now provides, in part, as follows:

"(b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

"(2) The Commission believes that such state laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment

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practice or as a basis for the application of
the bona fide occupational qualification exception."
(Emphasis ours)

As a result of the above amended Guidelines, the reliance of the Missouri Attorney General Opinion No. 45, Walsh, 1-31-67, upon the previous Guidelines is no longer good authority and the opinion is being withdrawn. In addition, since the Walsh opinion was issued, several federal courts have ruled on similar legislation concerning this subject.

In Rosenfeld v. Southern Pacific Company, 293 F.Supp. 1219 (C.D. Cal. 1968), it was held that the California Hours and Wage legislation, regulating hours and conditions of employment for women, did not create a bona fide occupational qualification within the meaning of the Civil Rights Act, but discriminated against women on account of sex. The court further found that the legislation was void and of no effect, as being contrary to the supremacy clause of the federal constitution.

A similar view was followed in Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969). Here, it was held that an employer, in refusing to give a female employee a position as a press operator, violated equal employment provisions of the Civil Rights Act, even though it did so in good faith reliance on a manufacturing order of a state wage and hour commission prohibiting an employer from requiring a female employee to lift or carry any object weighing in excess of thirty pounds. The court indicated that the law no longer permitted employers or the states to deal with women as a class in relation to employment, and that while the particular state regulation might be reasonable under the Equal Protection Clause, it was no longer permitted under the supremacy clause in the Civil Rights Act.

In Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969), it was held that a seniority system permitting men to bid for jobs plant wide but restricting women to jobs not requiring lifting more than thirty-five pounds violated the Civil Rights Act. The Circuit Court of Appeals reversed the District Court on this issue. The District Court relied on the exception permitting discrimination in hiring by sex where sex is a bona fide occupational qualification and Section 2000e-7 which states that the act shall not be deemed to relieve those covered under it from any liability imposed by state law, except where such law would require the doing of any act which would be an unlawful employment practice. The language of the Court of Appeals on page 716 was as follows:

" . . . Thus, the court succumbed to the erroneous argument that state laws setting weight-lifting restrictions on women were not affected

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by Title VII. While we agree with the court's noting of the EEOC's statement that it cannot be assumed that Congress intended to strike down all such state legislation, we also observe that that statement was presented to the court out of its proper context. . . ."

The court then quoted extensively from the EEOC's revised Guidelines in August of 1969 and concluded in effect that most of the state limits were enacted many years ago and would be considered unreasonable in light of the average physical development, strength and stamina of most modern American women; and that individual qualifications and characteristics should be considered.

In Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228 (5th Cir. 1969), it was held that a telephone and telegraph company which denied a switchman's job to an applicant because she was a woman, failed to meet the burden of proving that the switchman's position came within the exception to the general prohibition where sex is a bona fide occupational qualification reasonably necessary to normal operation of a particular business or enterprise. The court said that the legislative history of the Civil Rights Act indicated that the bona fide occupational qualifications exception was intended to be narrowly construed (emphasis ours).

In the companion cases of Caterpillar Tractor Co. v. Grabiec and Illinois Bell Telephone Company v. Grabiec, 317 F.Supp. 1304 (S.D. Ill. 1970), it was held that the Illinois Female Employment Act was in conflict with Title VII of the Federal Civil Rights Act of 1964, insofar as the Illinois law purported to restrict the hours of labor by female employees and was void and not enforceable as to the plaintiff. The reasoning was based on the supremacy clause of the United States Constitution.

In Ridinger v. General Motors Corporation, 325 F.Supp. 1089 (S.D. Ohio 1971) female employees contended that the General Motors Corporation had discriminated against them and classified them on the basis of sex with the result that they had been denied employment opportunities which were extended to males, such as Saturday and Sunday overtime work and better paying jobs. This contention was not denied by the General Motor Corporation, but it contended that its action was compelled by the Ohio statutes regulating and restricting female employment and that these statutes were valid. The District Court held that the Ohio statutes which precluded females from holding certain jobs and from receiving other employment benefits such as overtime pay which was available to men solely on the basis of the stereotyped characterization, as to the capabilities of women without reference to individual capacities of individual employees did not establish bona fide occupational qualifications within the meaning of Title VII of the Civil Rights Act

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of 1964. Therefore, the Ohio statutes were invalid because they were in conflict with and frustrated the policy and purpose of Title VII of the Civil Rights Act of 1964.

In the recent case of Phillips v. Martin Marietta Corp. decided by the United States Supreme Court on January 25, 1971, and reported at 39 U. S. Law Week 4060, the Supreme Court reversed the Fifth Circuit Court of Appeals and held that an employer was improperly granted summary judgment in an action under Title VII of the Civil Rights Act of 1964 by a woman with pre-school aged children, who alleged she was denied employment because of her sex since Section 703(a) of the Act did not permit one hiring policy for women with pre-school aged children and another for men with such children. The court further held that the existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under Section 703(e) of the Act, but the record was inadequate to determine whether the conditioning question was a bona fide occupational qualification. The court then remanded the case back to the Fifth Circuit Court of Appeals.

Since the Martin Marietta Corp. case was decided, it was held in Garneau v. Raytheon Company, 323 F.Supp. 391 (D. Mass. 1971) that a Massachusetts statute prohibiting female employees from working more than nine hours in any one day and not more than forty-eight hours in any one week was unenforceable because of a direct conflict with the equal employment provisions of the Civil Rights Act of 1964.

Similarly in Kober v. Westinghouse Electric Corporation, 325 F.Supp. 467 (W.D. Penn. 1971), it was held that the provisions of Pennsylvania Women's Labor Law of 1913, insofar as it regulated hours of employment of females was in conflict with the Civil Rights Act of 1964 and the federal legislation prevailed under the supremacy clause of the federal constitution. It was further pointed out that reliance on the Pennsylvania statute limiting the number of hours women could work did not create a bona fide occupational qualification within the meaning of the Civil Rights Act of 1964 and did not justify an employer's failure to promote a female, who could not have performed the job without causing an employer to violate the Pennsylvania Women's Labor Law.

It has also recently been held in General Electric v. Young decided on June 2, 1971, 3 FEP Cases 560 (W.D. Ky. 1971), that as between Title VII of the Civil Rights Act of 1964 and Kentucky legislation limiting the number of hours women may work, the federal law enacted by Congress must prevail under the supremacy clause of the federal constitution.

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Finally, in the case of Vogel v. Trans World Airlines, F.Supp. _____ (W.D. Mo. 1970), the following comment was made by the U. S. District Court for the Western District of Missouri on page 6 of its opinion:

"In the light of current federal standards, substantial doubt is cast on the continuing validity of Section 290.040 RSMo, on which, it is stipulated, defendant formerly placed 'good faith reliance.' The statute clearly purports to place industry-wide prohibitions on the over-time working of women. It is now well-settled that industry-wide exclusions of employment opportunity for women are not in accordance with current federal standards. . . ."

Thereafter on May 10, 1971, the court subsequently amended its opinion and page 20 of its opinion now reads as follows:

". . . Insofar as § 290.040 RSMo would compel defendant to uniformly deny women employees the right to work in excess of 54 hours weekly, it is invalid and provided no defense to this action. . . ."

In addition to the above court decisions, the Attorneys General of Oklahoma, Michigan, North and South Dakota, Pennsylvania, Washington, and Wisconsin have held that their state laws limiting the working hours of women have been superseded by the federal legislation.

As a result of the above, it is our view that Section 290.040, RSMo 1969, which regulates the hours of labor of female employees on a broad industry-wide basis is in irreconcilable conflict with Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sections 2000e-2000e-15). When such conflict exists it is a fundamental principle of constitutional law based on the supremacy clause of the United States Constitution (Article VI, Clause 2) that the federal act will prevail over the state act to the extent that it preempts it. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed.23 (1824); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). It is submitted the conflict is readily apparent. Section 703(a) of the federal statute expresses a prohibition against any employment practice which discriminates against employees with respect to compensation, terms, conditions and privileges of employment because of their sex. Whereas under Section 290.040, RSMo 1969, a Missouri employer in the industries enumerated must not permit a woman to work longer than nine hours a day or fifty-four hours a week. Consequently, a woman is denied the same rights to overtime compensation as her male counterpart and the limitation on the number of

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hours a woman may work could prevent the promotion of women to supervisory positions which might require longer hours than state law permits, each of which would be in direct violation of the federal act. In addition, while Section 703(e) of the federal statute (42 U.S.C., Section 2000e-2e) permits discrimination in hiring where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise the Missouri statute is designed to cover women as a class and does not apply to women employees on an individual basis. Under such circumstances, it is our view that the Missouri statute does not constitute a bona fide occupational qualification within the meaning of the federal act. Therefore, it is our opinion that the provisions of Title VII of the Civil Rights Act of 1964 barring discriminatory employment practices with respect to woman workers have superseded Section 290.040, RSMo 1969, limiting the hours of labor of women employed by "employers" subject to said act.

We will next consider the issue raised in your opinion request as to the enforcement of Section 290.040, RSMo 1969. In this regard, Section 290.070, RSMo 1969, provides that the Director of the Division of Industrial Inspection of the Department of Labor and Industrial Relations shall be charged with the enforcement of the provisions of Section 290.040, RSMo 1969, and the prosecution of all violations thereof.

Section 701(b) of the federal act (42 U.S.C., Section 2000e-(b)) defines the term "employer" as follows:

"The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 § 501(c)]:
. . ."

As a result of the above, it should be noted that Title VII of the Civil Rights Act of 1964 does not cover all employers. In general, Section 701(b) of the federal act (42 U.S.C., Section 2000e-(b)) defines coverage to include employers engaged in interstate commerce with twenty-five or more employees for each working

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day in each of twenty or more calendar weeks of the year. It is evident, however, that Congress did not intend to occupy the entire field. Section 1104 of Title XI of the Civil Rights Act of 1964 (42 U.S.C., Section 2000h-4) provides as follows:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Section 708 of Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000e-7) also provides as follows:

"Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title."

It is submitted that the foregoing statutory provisions acknowledge state regulatory power where the state law on the subject is not inconsistent with the federal law. Thus, the federal law preempts and will prevail over Section 290.040, RSMo 1969, to the extent that it covers a particular Missouri employer. In this regard, there is authority for the proposition that the principal test for the application of the supremacy doctrine is presence of actual or potential conflict. Under such circumstances, a state law clearly conflicts with a federal statute when a person incurs the penalties of one by obeying the other. Southern Railway Company v. Reid, 222 U.S. 424, 32 S.Ct. 140, 56 L.Ed.257 (1912). However, obedience to Section 290.040, RSMo 1969, by Missouri employers who are not employers as defined in Section 701(b), supra, would not subject them to federal sanctions as there is no clear collision between the state and federal law as applied to them. Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962). Therefore, it is our opinion that those employers not covered by the federal act will remain subject to the maximum hours limitations of Section 290.040, RSMo 1969, and the Division of Industrial Inspection will have the responsibility of enforcement in accordance with Section 290.070, RSMo 1969.

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In reaching the foregoing conclusions, we are not unmindful of a chivalrous and paternalistic attitude toward women in our society. Fortunately, traditional courtesies have neither been required nor prohibited by federal or state statute. Therefore, without suggesting that chivalry is dead, we simply no longer hold to Shakespeare's immortal phrase "Frailty thy name is woman." (Hamlet, Act I, Scene 2, line 146). Instead we adopt the words of Tennyson (The Princess, Stanza 7, line 243):

"The woman's cause is man's. They rise or sink together; dwarf'd or godlike, bond or free, if she be small, slight-natured, miserable, how shall men grow?"

CONCLUSION

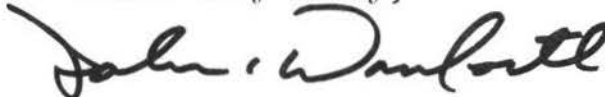
The opinion of this office is as follows:

1. Title VII of the Civil Rights Act of 1964 barring discriminatory employment practices with respect to woman workers has superseded Section 290.040, RSMo 1969, limiting the hours of labor of women employed by employers subject to the provisions of the federal act.

2. Those employers not covered by the provisions of Title VII of the Civil Rights Act of 1964 will remain subject to the maximum hours limitation of Section 290.040, RSMo 1969, and the Division of Industrial Inspection will continue to have the responsibility of enforcement in accordance with Section 290.070, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

April 1, 1971

Opinion Letter No. 232

Answered by letter-Klaffenbach

Honorable Truman E. Wilson
Missouri Senator, District 24
Capitol Building - Room 321
Jefferson City, Missouri 65101



Dear Senator Wilson:

This letter is in response to an opinion request concerning numerous questions posed by one of your constituents with respect to levee districts organized by circuit court order under Sections 245.010 to 245.280, RSMo 1969.

The first question asks whether a member of the Board of Supervisors is required to own one acre of land. Section 245.060, RSMo 1969, requires that such supervisors be owners of real estate in said district but there is no requirement that such ownership be of one acre or more of land. The same section with respect to the election of supervisors provides that "each owner shall be entitled to one vote in person or by proxy for every acre of land or mile of right-of-way owned by him in such district". However, this latter provision pertains only to such voting rights and since there is no such express requirement with respect to the qualifications of supervisors we do not believe that such can be implied.

The second question posed concerns proxies and asks for a ruling on several varied situations involving the use of proxies. The statutes in question contain no express provisions answering such questions and therefore the answers would be found in the general case law with respect to proxies. In our view however, such answers should be supplied by counsel involved in the day to day operation of the district and not by an opinion or ruling of this office. The same is true with respect to the question that follows concerning expenditure and bookkeeping procedures allegedly followed in a particular situation presented by your informant. That is, and we reiterate, these questions are basically local in nature and present day to day local issues and should be resolved on a local level.

Honorable Truman E. Wilson

Another question appears to ask whether it is proper for minutes to be kept in a loose leaf notebook. Section 245.165, RSMo 1969, requires the Board to keep a record of proceedings in "a well-bound book". While it may have been the legislative intent that pages of such a book could not be removed, we view the intent of the legislature in enacting this requirement only as a command that the records be held encased within a cover sufficient to preserve and protect the contents. That is, in our view, the records must be covered and held together although not necessarily permanently attached to such binding.

We also note in this respect that the Supreme Court of Alabama in Holcombe v. State ex rel Chandler, 200 So. 739, 748, held that a "loose-leaf" book kept by a sheriff was in substantial compliance with a statute which required the sheriff to keep a "well-bound book". The Supreme Court of Mississippi in Richardson v. Woolard, 97 So. 808, 809, reached a similar conclusion.

The question with respect to the surety bond requirements of Section 245.240, RSMo 1969, involves a question of fact and not of law. We cannot determine questions of fact in a legal opinion.

The last question presented, among other things, attacks the action of a circuit court in a matter before the court. Clearly such questions are not the proper subject of an opinion of this office under Section 27.040, RSMo 1969.

Very truly yours,

JOHN C. DANFORTH
Attorney General

April 1, 1971

Opinion Letter No. 233
Answered by letter-Klaffenbach

Honorable Allan G. Mueller
Representative, District 50
Capitol Building - Room 415
Jefferson City, Missouri 65101



Dear Representative Mueller:

This letter is in response to your opinion request in which you ask concerning the constitutionality of House Bill No. 962 of the 76th General Assembly which has not as yet reached final passage and which relates to pawnshops and pawnbrokers, with penalty provisions. In particular, you question that portion of the bill which requires that the licensee take and retain a photograph of each person who pawns tangible personal property for a loan of money.

In City of St. Joseph v. Levin, 31 S.W. 101 (1895) the Supreme Court of Missouri upheld the constitutionality of a city ordinance requiring pawnbrokers to keep the description of property left in pawn together with the name and residence of the person by whom such property was left and to submit such records for inspection by the police on demand. In our view this decision is still controlling.

We have examined the questioned portion of the bill as well as the bill in its entirety and find no constitutional infirmity.

Very truly yours,

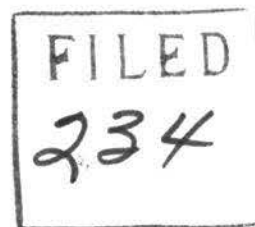
JOHN C. DANFORTH
Attorney General

August 18, 1971

OPINION LETTER NO. 234
Answer by letter-Romines

Honorable Les Langsford
Representative, District 141
2311 South Dollison
Springfield, Missouri 65804

Honorable J. H. Frappier
Representative, District 24
2335 Hummingbird Drive
Florissant, Missouri 63033



Dear Representatives Langsford and Frappier:

This is in reply to your request concerning the legality of present provisions for the election of ward and township committeemen and committeewomen in view of the one-man-one-vote rule established by the United State Supreme Court. You have also forwarded with your request a memorandum of law from which you conclude the one-man-one-vote principle applies in the selection of committeemen and committeewomen in this state.

The relevant Missouri statutes under consideration are Sections 120.750 through 120.840, RSMo 1969. These statutes generally set out the manner in which the central committee of a political party is selected, the manner in which county committeemen and committeewomen are elected, and the powers that these persons have under law. The contention is advanced that the one-man-one-vote principle enunciated by the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Simms, 377 U.S. 533 (1964) applies to the foregoing Missouri statutes, and as a result of this application, committeemen and committeewomen must be selected on a one-man-one-vote principle.

The decision of the Supreme Court of the United States in Baker v. Carr developed from a line of cases known as the White Primary cases. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); and Smith v. Allwright, 321 U.S. 649 (1944).

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In Herndon, the Supreme Court invalidated a Texas statute which expressly denied to blacks the right to vote in the Democratic party primary. The Texas statute under challenge in Condon granted power to the party through its executive committee to prescribe qualifications for party membership and the right to vote in the primary. The executive committee of the Democratic party barred blacks from participation in the primary, and the court invalidated the regulation. Justice Cardozo for the court held that the inherent power of a party to choose its members lay with the state convention, and by this statutory conferral of authority upon the executive committee there was sufficient state involvement to trigger the appropriate constitutional restraints. After the decision in Condon, the Texas Democratic party excluded blacks by resolution of the state convention which, according to the court in Condon, had the inherent power to set qualifications for participation in the primary. In Grovey v. Townsend, 295 U.S. 45 (1935), the court unanimously upheld the new restrictions imposed by the Texas Democratic party. The doctrine of Grovey, however, was specifically overruled nine years later in Allwright where the court admitted that while the privilege of membership in a political party alone might not be a concern of the state, yet ". . . when . . . that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State. . . ." [loc. cit. at 664]. In Allwright, the court also held that the holding of primary election is essentially a state function, an integral part of the procedure for selecting public officials, and that the requisite state action was therefore present even when the state had delegated control to a political party.

In Terry v. Adams, 345 U.S. 461 (1953), the Supreme Court held that blacks could not be excluded from a pre-primary held by a self-governing club which effectively controlled Democratic party nominations in the county, even though the club was ostensibly completely independent of both the party and the state government. The case established that the holding of a formal primary under state or even party auspices is not a prerequisite for a finding of state actions. The court in Terry explicitly endorsed the opinion in Rice v. Elmore (4th Cir. 1947) 165 F.2d 387 in which that court stated the relationship between party and state thusly:

" . . . The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, governmental agencies through which the sovereign power is exercised by the people. . . ." [loc. cit. at 389]

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In Gray v. Sanders, 372 U.S. 368 (1963), the court struck down the Georgia County unit system of tabulating votes in statewide primaries for United States senator, governor, and other state officials. Under the Georgia procedure the winner of the popular vote in each county received all the county's units, and the candidate with the largest number of units won the nomination. The court held that even where the total number of units were distributed among counties according to their population, the system was unconstitutional since it resulted in the disenfranchisement of the minority voters of each county, thereby making it possible for a candidate with less than a plurality of the total popular vote to win a plurality of county units and hence the nomination.

While Gray held that the state could not superimpose a county unit system on the outcome of the popular vote in a state primary, the later case of Fortson v. Morris, 385 U.S. 231 (1966) seems to limit the principle of full popular control. In Fortson, the court upheld a provision of the Georgia Constitution which gave the state legislature the power to elect the governor when none of the candidates in the popular election received a majority of the vote. The Fortson majority treated the election by the legislature as a separate, alternative process under Georgia law, and therefore found no problem with the fact that the legislature's choice had placed second in the popular vote. Gray was distinguished since nothing in that case ". . . indicated that it was intended to compel a State to elect its governor . . . through elections of the people rather than through selections by appointment or elections by the State Assembly. . . ." [385 U.S. at 233]. Fortson thus placed a limitation on Gray: before the one-man-one-vote rule is applicable, there must be a showing of a commitment to popular election as the exclusive means of selecting the official. See also, Sailors v. Board of Education, 387 U.S. 105 (1967).

In line with the foregoing principles, the courts have limited the application of the one-man-one-vote principle to the following popularly elected bodies: city councils, Armentrout v. Schooler, (Mo.Sup. 1966) 409 S.W.2d 138; Ellis v. Mayor and City Council of Baltimore (4th Cir. 1965) 352 F.2d 123; board of county commissioners, Bailey v. Jones, 139 N.W.2d 385 (S.D. 1966); county board of supervisors, State ex rel. Sonneborn v. Sylvester, 132 N.W.2d 249 (Wis. 1965); Bianchi v. Griffing (E.D. N.Y. 1965) 238 F.Supp. 997; school boards, Kramer v. Union Free School District, 395 U.S. 621 (1969); and trustees of a junior college district, Hadley v. Junior College District, 397 U.S. 50 (1970).

In Hadley v. Junior College District, supra, the Supreme Court applied the one-man-one-vote principle to the election of trustees of a junior college district of Metropolitan Kansas City. In so doing, the court noted, by Mr. Justice Black:

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"It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' Avery, supra, at 482, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established as a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. . . ."
[loc. cit. at 55-56]

The Supreme Court of the United States has not extended this general rule outlined in Hadley to a factual circumstance such as you outline in your opinion request.

The United States Court of Appeals for the Third Circuit has, however, rejected an argument that Reynolds applied to the selection of a party county chairman. In Lynch v. Torquato (3rd Cir. 1965), 343 F.2d 370, plaintiff sought an injunction against the election of a county chairman whose function the court found to be primarily the internal management of party affairs. While acknowledging that one-man-one-vote applies to both state regulated and party conducted primaries, the court said that, ". . . this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. . . ." [loc. cit. at 372]. The court reached this conclusion based on the fact that the county chairman was not a state officer, and that since governmental functions were not involved in all the activities of the county chairman, the court refused to apply Reynolds.

Several recent cases have involved attacks on selection of delegates to national party conventions. In Irish v. Democratic-Farmer-Labor Party of Minnesota (8th Cir. 1968) 399 F.2d 119, before the court was the process of selection of delegates from Minnesota to the 1968 National Democratic Convention and whether

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this process had violated the one-man-one-vote principle enunciated in Gray v. Sanders and Avery v. Midland County, 390 U.S. 474 (1968). The court reasoned that the process of choosing delegates to the state convention could be divided into two distinct procedures. At the precinct level came the popular election of delegates to the county conventions. At this level the court conceded that equal protection required that one-man-one-vote be observed. At the second level, the various county conventions selected delegates to the state convention, which would in turn elect delegates to the national convention. The party constitution did not require popular participation at this level; discretion as to county representation at the state convention rested not with the precinct voters but with the county convention delegates. Relying on Fortson, supra, and Sailors, supra, the Eighth Circuit held the Minnesota procedure was not malapportionment such as should be struck down.

In Maxey v. Washington State Democratic Committee (W.D. Wash. 1970) 319 F.Supp. 673, the contention was made that the one-man-one-vote principle enunciated by the Supreme Court in Baker v. Carr applied to a state political party convention system the same as it applied to a party primary. The court in that case held that the one-man-one-vote principle did apply to the matter of sending delegates to the state and national conventions. In so holding, the court stated:

" . . . Plaintiffs' right to vote and to have their votes weighted equally with all other votes have been unconstitutionally denied and diluted under the system presently employed by the defendant state committee.

"It is a political fact of life that the effectiveness of one's participation in the general election is in large part determined by the opportunity for participating at the nominating stage. . . .

* * *

"This case presents the question reserved by the Supreme Court in Gray v. Sanders, 372 U.S. 368, 378 n.10, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963): whether or not the one-man-one-vote principle applies when the convention process, instead of the primary system, is used for nominating candidates." [loc. cit. at 678-679]

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Honorable J. H. Frappier

The court in Maxey recognized a further question before it; that being when the state created presidential election process began. As to this question, the court stated:

" . . . Obviously, the process is a continuing one that begins for some voters when they register to vote. For the purposes of this case, I hold that the process begins when the state committee allocates the delegates to the state convention. It is at this point strictures of Gray and the one-man-one-vote principle require that the allocation be made on some rational population basis. Either total population or total Democratic voters as measured by the Democratic vote in the last presidential election should satisfy the equal-vote requirement."
[loc. cit. at 679]

Both Irish and Maxey dealt specifically with attacks on the selection of delegates to national conventions. The court which sat in Maxey, however, in a companion case, Dahl v. Republican State Committee (W.D. Wash. 1970) 319 F.Supp. 682, had a direct attack upon the composition of the state committee itself, and an attack upon the constitutionality of the state statute which provided for the state committee. Plaintiff's contention in Dahl was that the basis of electing state committees diluted plaintiffs' votes because the state committee was a crucial and integral part of the state created presidential election process. In refusing to extend the Reynolds principle the court stated as follows:

"I decided in Maxey that the state-created election process begins when the state committee calls the state convention and allocates delegates to the county party organizations. It follows that the election process has not yet commenced when the state committees are being organized. . . .

* * *

" . . . The election of the state committee is not an integral phase of the presidential-election process. National-convention delegates could be provided for if there were no state committee. Gray has no application. Also, since the state does not provide for the popular election of state committees, Hadley is inapplicable." [loc. cit. at 684]

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In so refusing to apply the one-man-one-vote principle at the state committee level, the court relied on Lynch v. Torquato, supra, Rogers v. State Committee of Republican Party, 232 A.2d 852 (1967); and Azevedo v. Jordan, 47 Cal.Rptr. 125 (1965). Likewise, in Chavis v. Whitcomb (D.C. Ind. 1969) 305 F.Supp. 1365, a federal district court refused to extend the one-man-one-vote principle, beyond its literal meaning, to "intra-party organization"; the court there stated:

"As to the plaintiffs Marilyn Hotz and Rowland Allen, there is a failure of proof to establish a basis for granting the relief prayed for in the complaint.

"The evidence shows that plaintiff Marilyn Hotz is a white person, by political preference a Republican who actively votes in both the Republican primary and the general elections. She resides in Marion County but outside the City of Indianapolis in what the complaint describes as the 'White Suburban Belt.' She has voted for precinct committeemen and vice-committeemen in the Republican primary elections and on General Assembly seats in the Republican primary elections. When asked whether she made an individual voter's choice, she stated that she voted 'the slate.' Her complaint is that persons living outside the City include less than one-third of the population of Marion County but almost one-half of the regular Republican voters of the county, and that such residents are deprived of a proportionate voice as to who their Republican state legislators shall be, in years of Republican victory in Marion County. While the evidence indicates the selection of tickets of candidates for Republican primary elections are put together by the party organization and the election of the legislative delegation from Marion County is elected at large, the evidence falls short of establishing that plaintiff Hotz's interests are significantly different from those of other Republican voters in the years of Republican victory. And while her voice as to whom the Republican state legislators shall be may not be proportionate to the percentage of Marion County Republican voters who live outside the City of Indianapolis, this complaint primarily

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is directed to intra-party organization and selection of candidates and does not in our opinion rise to the degree of a constitutional deprivation of equal protection by reason of the statutes here under attack." [loc. cit. at 1389; emphasis added]

As can be seen by reference to the foregoing cases, the federal courts have refused to extend the one-man-one-vote principle to the area of political parties beyond selection of delegates to national conventions, and beyond the insistence of a one-man-one-vote principle being applied to primary elections. Further, the courts which have considered your argument have rejected it, the basis being that for the purposes of equal protection and Reynolds v. Sims, the party officials under discussion were not "state officers," and that these party officials did not perform "governmental functions."

The law of Missouri is that for the purposes of election contests committeemen and committeewomen elected at primary elections by the political parties of Missouri are in the nature of public officers. State ex rel. Ponath v. Hamilton (Mo.Sup. en banc 1922) 240 S.W. 445. This reasoning of the Supreme Court of Missouri has subsequently been affirmed in the following cases: State ex rel. Kaysing v. Ryan (Mo.Sup. en banc 1934) 67 S.W.2d 983; State ex rel. Dawson v. Falkenhainer (Mo.Sup. en banc 1929) 15 S.W.2d 342, and Noonan v. Walsh (Mo.Sup. 1954) 273 S.W.2d 195. None of these cases, we note, have dealt with an application of Reynolds and we find them nondispositive of the question.

After a review of the foregoing authority, we find no case which has extended the one-man-one-vote principle to the lengths you suggest. We note also Mr. Justice Black's caveat in Hadley v. Junior College District, supra:

" . . . It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds, supra, might not be required, . . ." [loc. cit. at 56]

We conclude that the several committeemen you suggest should have the one-man-one-vote principle applied to their election fall within the exception announced by Mr. Justice Black and literal compliance with Reynolds is not required.

Honorable Les Langsford
Honorable J. H. Frappier

Additionally, we note the most recent cases from the United States Supreme Court dealing with the application of Reynolds, have refused to extend its applicability. See, Abate v. Mundt, U.S. _____, 29 L.Ed.2d 399 (1971); Whitcomb v. Chavis, U.S. _____, 29 L.Ed.2d 363 (1971); Gordon v. Lance, U.S. _____, 29 L.Ed. 2d 273 (1971). These cases cited favorably Sailors, supra, and Fortson, supra, and distinguish Reynolds and Baker. Our conclusion is thus compelled that the one-man-one-vote principle of Reynolds v. Sims does not apply to committeemen and committeewomen in Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

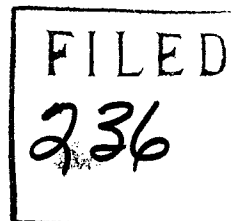
SCHOOLS:
ELECTIONS:

A board of directors of a six-director school district has no authority to prescribe rules governing the selection of candidates for election to membership on such board.

OPINION NO. 236

October 21, 1971

Honorable Carrol J. McCubbin
State Representative, District 123
Rural Route 3
Eldon, Missouri 65026



Dear Representative McCubbin:

This letter is in response to your request for an opinion of this office in which you ask the following:

"May political parties select the candidates for nomination for the board of education in a six-director school district and, if the opinion in reference to the above question is affirmative, does such selection preclude the filing of candidacy by any other person?"

"The above questions arise from a situation in which the Board of Education in a school district has set up in their rules and regulations a procedure whereby they permit the major political parties to select a nominee of their party as a candidate for each position on the Board of Education. These selections are made at a mass meeting held by each party. The names are placed on the ballot with no party designation; the aim being to provide one candidate from each party for each position on the Board of Education.

"In following this procedure only those who appear at the mass meeting have a voice in selecting the nominee and a candidate who desires to run who is not selected by the group at the mass meeting could be eliminated without a vote of the people of the district."

Honorable Carrol J. McCubbin

We have examined the Missouri statutes and find no statute prescribing the procedure for nomination of candidates in elections of directors of such six-director school districts.

We further understand that the question centers upon whether the school board under its rule-making power can prescribe a mass meeting procedure whereby the two major parties at such a mass meeting each select their nominee or nominees. The procedure also allows for independent nominations by petition signed by the number of qualified voters in the district equal to eight percent of the largest number of votes received by any candidate in the last preceding regular school board election.

Section 171.011, RSMo 1969, with respect to the authority of the school boards to make rules and regulations states:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. . . ."

We find no Missouri or other case authority precisely in point on the question that you ask. However, the Missouri Supreme Court noted with respect to rules promulgated by such boards in Wright v. Board of Education of St. Louis, 246 S.W.43 (1922) 1.c. 45:

". . . Aside from other considerations which may properly regulate this discretion, is the fact that the public school system owes its existence and perpetuity to taxes drawn from the people; in a sense therefore the citizen may be said to have a proprietary interest in the system.

"This is true not only in a pecuniary sense in that he contributes annually to its support but on account of the advantages extended to his children, who, within the contemplation of the law, are entitled, without stint or distinction, to whatever rights and benefits the system affords.

"[2] The power of the board to make the rule in this case is to be considered prior to a

Honorable Carrol J. McCubbin

determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. . . ."

While we do not doubt the board's authority to regulate certain aspects of the conduct of such elections, not in question here, the procedure prescribed by the board in this instance vastly limits the selection of the voters at the election held pursuant to Section 162.371, RSMo 1969 to a limited few candidates who have already been chosen by a mass meeting of partisan groups or by petition.

It is our view that such a rule prescribing the method for the selection of candidates is not within the rule making power of the board and that this is so for the reason that the legislature has neither expressly nor impliedly authorized such a rule.

By comparison we note that statutes not applicable here such as Section 162.271, RSMo 1969 which deal with similar elections prescribe the method of nomination and selection of candidates.

In this instance the legislature has not seen fit to prescribe a method of nomination or selection of candidates and it is our view that the board of education has no power to do so. As a consequence, any person who is otherwise eligible should have the right to be a candidate and to have his name placed upon the ballot to be voted on in accordance with the provisions of Section 162.371.

CONCLUSION

It is the opinion of this office that a board of directors of a six-director school district has no authority to prescribe rules governing the selection of candidates for election to membership on such board.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

WATER POLLUTION:

The Missouri Water Pollution Board does not have the authority to require as a condition of a permit for the construction and operation of a water treatment facility which will at present meet the requirements of Chapter 204, RSMo, the Missouri Water Pollution Law, the posting of financial security to ensure future treatment facilities when such additional facilities will be required.

OPINION NO. 239

May 13, 1971



Mr. Jack K. Smith
Executive Secretary
Missouri Water Pollution Board
P. O. Box 154
Jefferson City, Missouri 65101

Dear Mr. Smith:

This is in reply to your request for an official opinion of this office as to whether the Missouri Water Pollution Board may require as a condition of a permit for the construction and operation of an interim water pollution treatment facility the escrow of funds, posting of bond, or the giving of other bona fide financial security, sufficient to provide for the ultimate construction of full treatment facilities.

Chapter 204, RSMo 1969, establishes the board and provides for powers and duties to carry out the purposes of the law. Section 204.020 states the policy of the law, Section 204.080 specifies certain duties, and Section 204.090 specifies certain powers.

Subsection 1 of Section 204.030 declares it unlawful for any person to cause water pollution. Subsection 2 and 3 provide for a permit as follows:

"2. No person, without first securing from the board a permit, shall construct, install or modify any system for disposal of sewage, industrial wastes, or other wastes or any extension or addition thereto when the disposal of the

Mr. Jack K. Smith

sewage, industrial wastes or other wastes constitutes pollution as defined in this chapter; increase the volume or strength of any sewage, industrial wastes or other wastes in excess of permissive discharges specified under any existing permit; or construct or use any new outlet for the discharge of any sewage, industrial wastes or other wastes into the waters of the state which constitutes pollution as defined in this chapter.

"3. Any person desiring to erect or modify facilities or commence or alter an operation of any type which will result in the discharge of sewage, industrial wastes or other wastes into the waters of the state shall apply to the board for a permit to make a discharge which constitutes pollution as defined in this chapter. The board, under the conditions it prescribes, may require the submission of such plans, specifications and other information as it deems relevant in connection with the issuance of the permits. The board shall determine whether or not the discharge will cause a condition of pollution contrary to the public interest. The board may issue a permit which authorizes the person to make the discharge, and may specify on the permit the conditions under which the discharge shall be made. The board may revoke or modify any permit if the holder of the permit is found to be in violation of subsection 2, or if the holder of the permit fails to operate an existing facility as specified in the approved plan. No permit may be revoked or modified without first giving thirty days' written notice to the holder of the permit of intent to revoke or modify the permit."

Nowhere in the provisions cited above, nor in any other provision of Chapter 204, is there a specific requirement for the posting of financial security.

Mr. Jack K. Smith

Administrative agencies are creatures of statutes and do not have any jurisdiction or authority except such as has been conferred by law. Soars v. Soars-Lovelace, Inc., 346 Mo. 710, 142 S.W.2d 866 (1940). The powers of administrative agencies can only be exercised as are conferred expressly or by necessary implication. Wright v. Board of Education, 295 Mo. 466, 246 S.W. 43, 27 A.L.R. 1061 (1922). Such implied powers must be reasonably incidental to the purposes of the express powers. State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (1943).

Since Chapter 204 does not expressly confer such power, the question is whether there is an implied power. If there is any doubt or ambiguity concerning the existence of a power, it should be resolved against the agency. Wright v. Board of Education, supra.

The power in question is whether the board can require the posting of security as a condition for the issuance of a permit. Section 204.030(3) relating to permits does provide for conditions on permits but does not specify what kinds or types of conditions.

In the facts you have presented the applicant for the permit will meet the requirements of the law by building the so-called interim facility. However, it is anticipated that as the applicant increases its activities additional or different treatment facilities will be required. The financial security would therefore be used as assurance that at some future date the applicant will meet the requirements of the law.

It is our opinion that under such circumstances the Water Pollution Board does not have such implied power to impose as a condition on the permit the posting of financial security. The purpose of the Water Pollution Law is to require a permit for the construction and operation of sewage disposal facilities only when there is pollution. Section 204.030. Since at the present time the facility to be constructed under the present permit application apparently is adequate to meet the requirements of the law, the only condition that could possibly be required by the Board would be those relating to the present facility.

Imposing as a condition the posting of financial responsibility on the present license for some possible future problem is no different than any agency requiring the posting of financial security for a license based on the possibility that at a future date the law may be broken. Such a requirement without specific statutory authority is beyond the power of the Board.

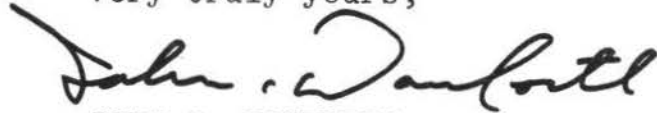
Mr. Jack K. Smith

CONCLUSION

It is the opinion of this office that the Missouri Water Pollution Board does not have the authority to require as a condition of a permit for the construction and operation of a water treatment facility which will at present meet the requirements of Chapter 204, RSMo, the Missouri Water Pollution Law, the posting of financial security to ensure future treatment facilities when such additional facilities will be required.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny.

Very truly yours,

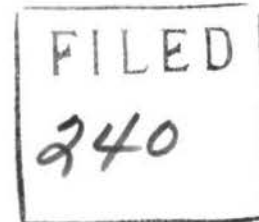
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

April 9, 1971

Opinion Letter No. 240
Answer by Letter (Klaffenbach)

Honorable George A. Ulett, M.D.
Director
Division of Mental Health
722 Jefferson St. - P.O. Box 687
Jefferson City, Missouri 65101



Dear Dr. Ulett:

This letter is in response to your request for an opinion in which you ask concerning whether a patient who has "eloped" from hospital premises and has since resided in his home community for an extended period of time without violating the law or the accepted rules of social behavior can be discharged by a state hospital superintendent.

You indicate that this situation has arisen in several instances and that such discharges by such superintendents have been questioned on the basis that it was believed that a patient who had left the premises of the institution without permission, should not be discharged. We also understand that you refer to patients who have been involuntarily committed to state mental institutions pursuant to the provisions of Section 202.807, RSMo 1969.

Under Section 202.827, RSMo 1969:

"The head of a hospital as frequently as practicable shall examine or cause to be examined every patient and whenever he determines that the conditions justifying involuntary hospitalization no longer obtain, discharge the patient."

In our view, the fact that a patient left the institution without permission is, in the total picture, a fact that relates to his fitness to be released. It is however, only a factor and there is no legal bar as such prohibiting the release of such a person. If in fact the head of the hospital is of the view that the conditions justifying involuntary hospitalization no longer exist it is his legal duty to discharge the patient.

Honorable George A. Ulett, M.D.

We trust that this answers your question.

Very truly yours,

JOHN C. DANFORTH
Attorney General

BANKS:
TAXATION:
CONSTITUTIONAL LAW:

The provisions of Section 148.110, RSMo 1969, do not contravene any provision of the Constitution of Missouri and are valid.

OPINION NO. 241

May 17, 1971

Honorable Frank Bild
State Representative
Capitol Building - Room 202I
Jefferson City, Missouri 65101



Dear Representative Bild:

This is in answer to your letter of recent date in which you asked whether Section 148.110, RSMo 1969, is constitutional, particularly in view of Sections 2 and 3 of Article X of the State Constitution.

Section 148.110, RSMo 1969, provides as follows:

"It is the purpose and intent of the general assembly to substitute the tax provided by sections 148.010 to 148.110 for the tax on bank shares which was imposed by section 10959, RSMo 1939, and for all taxes on all tangible and intangible personal property of all banking institutions subject to the provisions of sections 148.010 to 148.110, and for all property taxes on the shares of such banking institutions."

The tax referred to in Section 148.110 is found in Section 148.030, RSMo 1969, which provides as follows:

"1. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) as provided in 12 U.S.C.A., section 548, and every other banking institution shall be subject to an annual tax for the privilege of exercising its corporate franchises within the state according to and measured by its net income for the preceding year.

"2. The rate of tax for each taxable year shall be seven percent of such net income.

Honorable Frank Bild

"3. Each taxpayer shall be entitled to credits against the tax imposed by this law for all taxes paid to the state of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the unemployment compensation tax law of Missouri, and taxes imposed by this law."

Sections 2 and 3 of Article X of the Constitution of Missouri provide as follows:

"The power to tax shall not be surrendered, suspended or contracted away, except as authorized by this Constitution."

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law."

Before it can be determined whether or not Section 148.110 in any way violates the provisions of Sections 2 or 3 of Article X of the Constitution, it must be determined whether the tax provided in Section 148.030, can constitutionally be substituted for a personal property tax under the provisions of Section 4(c) and Section 6 of Article X of the Constitution of Missouri.

Section 4(c) provides as follows:

"All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

Section 6 of the Constitution of Missouri provides as follows:

Honorable Frank Bild

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

It is clear that the tax imposed by Section 148.030, on banks is an excise tax for the privilege of exercising its corporate franchise and is not a property tax. In view of the provisions of Section 6 of Article X of the Constitution which do not mention banks or bank property as property that is or may be exempted from taxation, it is necessary to determine whether the legislature can validly enact a statute which substitutes an excise tax on banks for the privilege of exercising their corporate franchises in place of personal property taxes on banks. It is our view that the provisions of Section 4(c) of Article X of the Constitution, quoted above, do provide that the legislature is authorized to levy an excise tax on banks in substitution for a tax on the personal property of banks either directly or by levying a tax on bank shares and that this authorization in the Constitution is an exemption from personal property tax which is in addition to the specific exemptions found in Section 6 of Article X of the Constitution.

Prior to the adoption of the Missouri Constitution of 1945, there was no constitutional provision for different methods of taxation of tangible personal property and intangible personal property, and prior to the adoption of the 1945 Constitution, Missouri statutes provided that personal property of banks including what is now classified as tangible personal property and intangible personal property was taxed by taxing bank shares. Personal property of banks was taxed by levying a tax on bank shares because of the fact that under federal law there were only four methods by which states could levy taxes against national banks other than real estate taxes and the only provision in the federal law for a personal property tax was a tax on the bank shares. This provision for taxation of banks was adopted by the General Assembly so that there would be no discrimination between national and state banks insofar as taxation is concerned.

It was, however, apparent to the members of the 1945 Constitutional Convention that the different methods of taxing tangible personal property and intangible personal property as provided in

Honorable Frank Bild

such 1945 Constitution would make necessary a different method of taxing banks. In the taxation file as originally introduced in the 1945 Constitutional Convention the following provision is found relating to bank taxes.

"In case the General Assembly shall substitute for the tax on bank shares a tax on the net income of the banks, or a tax measured by their net income, all sums so collected, less 2% for the cost collection, shall be returned in such manner as may be prescribed by law to the municipalities, counties, and other political subdivisions where the banks are located.'" (Emphasis added)

An amendment was offered to delete from such paragraph the provision "a tax on the net income of the banks or a tax measured by their net income" and to substitute instead the phrase "some other form of tax." The provision as originally introduced and the amendment both show that the clear intent of the proposed constitutional section was to authorize the legislature to "substitute" some other form of taxation on banks instead of and which would replace the tax on bank shares levied under the 1875 Constitution. The operative effect of such provision was to provide that any other form of taxation which might be substituted for the tax on bank shares would go to the local political subdivisions in which banks were located as did the proceeds from the bank shares tax which was a property tax. The obvious intent of the Constitutional Convention was to authorize the legislature to substitute another form of taxation for the personal property tax on banks or bank shares. This intent is clearly shown in the following excerpts from the Constitutional Convention Debates. The quoted remarks were made by Delegate Ethan A. H. Shepley and are found on pages 5006-5007, of the Constitutional Debates.

". . . Now, the principle, the important issue involved in this amendment is as follows. As you probably know, the states of the union are only permitted to levy any tax against national banks to the extent that Congress permits it to be done. Congress has enacted legislation which permits the states to tax national banks in four different ways. They can either tax the dividends received under an income tax or they may levy an excise or franchise tax based on the earnings of the bank or upon its assets or they may levy an ad valorem tax against the bank shares. That

Honorable Frank Bild

latter is the provision under which Missouri has always undertaken to impose a tax on national banks. We have a tax on bank shares.

* * *

" . . . Under the circumstances, we have every right to expect that the General Assembly, instead of continuing to impose it, the ad valorem tax, or property tax to the banks, will shift over to one of the other four or other three methods of taxation on banks and they will impose probably an excise tax measured by the earnings of the bank and will fix the rate so that it will at least preserve the revenue that now comes from the tax on bank shares, but if they did that in the form of a franchise or excise tax, of course it would be state revenue unless we put in a provision to the contrary in the Constitution and so we put this provision in providing that if they do substitute other than a property tax on the banks, that the proceeds will come back to the local communities." (Emphasis added)

After such statements were made by Delegate Shepley, the amendment was adopted and the Constitutional Convention then adopted the section providing that the proceeds of any tax substituted by the General Assembly for the tax on bank shares would be distributed to the local political subdivisions. It is clear from the action of the Constitutional Convention in adopting the amendment to the proposed section that the constitutional provision authorizes the legislature to substitute another form of taxation for a property tax on banks. Therefore, Section 4(c) of Article X of the Constitution, providing that a substitute tax for the tax on bank shares can be authorized by the General Assembly, provides for an exemption from personal property tax in addition to those exemptions found in Section 6 of Article X of the Constitution.

In the case of General American Life Ins. Co. v. Bates, 249 S.W.2d 458, the Supreme Court discussed the effect of the provision in Section 4(c) of Article X of the Constitution providing for a substituted tax for the tax on bank shares. In that case it was contended by the plaintiff that the provision in Section 4(c) of Article X of the Constitution authorizing the substitution of a form of taxation was applicable to intangible tax generally. However, the Supreme Court held that the provisions of such section providing for a substituted tax apply only to taxes on banks. The court said l.c. 465:

Honorable Frank Bild

"Respondents argue that while § 4(c), Art. 10, Mo. Const. 1945, relating to the collection and distribution of the tax on intangibles, does not create a right of substitution it assumes that the lawmaking power has the right to enact laws providing substitutes for the intangible personal property tax. We quote the material portion of said § 4(c), emphasizing the clause stressed by respondents: 'All taxes on property in class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares' are to be collected, et cetera, by the state and returned to the political subdivision of their origin as provided by law.

"We think the clause in italics was the result of the authority conferred by Congress, see 12 U.S.C.A. § 548, R.S.U.S. § 5219, 42 Stat. 1499; 44 Stat. 223, upon the states to tax national banking associations, and the policy of the state of taxing Missouri banks on the same basis as national banks. National banks are instrumentalities of the federal government, and the states do not possess the sovereign power with respect to their taxation that exists with respect to citizens of the state generally. State ex rel. Bay v. Citizens State Bank, 274 Mo. 60, 202 S.W. 382, 384(1); Maricopa County v. Valley Nat. Bk., 9 Cir., 130 F.2d 356, 359. Only the taxes against national banks contemplated in § 548, supra, are within the authority of the states. They embrace the power to tax the real estate; and either to tax (1) the shares of a national bank, or (2) to include dividends derived therefrom in the taxable income of the owner, or (3) to tax their net income or (4) according to or measured by their net income as provided and subject to the conditions in said § 548. The section has undergone several amendments. This act of Congress is of superior force to state constitutions and laws. Under the constitution of 1875 and the laws thereunder, Missouri assessed and collected taxes on the real estate of national banks and on their shares at their true value in money for the tax on the personal property of such banks; and state banks were put on the

Honorable Frank Bild

same plane. § 10959, R.S. 1939; Laws 1872, p. 90, § 35. See, among others, State ex rel. Miller v. Shryack, 179 Mo. 424, 430(I), 78 S.W. 808, 809; State ex rel. Koeln v. Lesser, 237 Mo. 310, 326, 141 S.W. 888, 892; State ex rel. Bay v. Citizens State Bk., supra. Observations supra respecting the State ex rel. United States Bank case are applicable. The clause in italics recognizes the above situation and is not an assumption of the existence of general authority in the lawmakers to enact substitute tax legislation in contravention of specific constitutional inhibitions." (2nd and 3rd emphasis added)

The Supreme Court recognized the fact that it was the intent of the framers of the Constitution to authorize the legislature to provide for a substitute tax for the tax on bank shares that existed at the time of the adopting of the 1945 Constitution because of the fact that the Constitutional Convention members were aware of the fact that it has always been state policy that state banks and federal banks should be taxed so that there would be no discrimination against state banks.

It is clear, therefore, that the tax provided in Section 148.030, is a substitute tax for the former tax on bank shares which was a property tax and that such tax is authorized by the provisions of Section 4(c) of Article X of the Constitution, that such exemption from personal property tax is an additional exemption to the provisions of Section 6 of Article X of the Constitution, and therefore, banks are exempted from the personal property tax provisions of the Constitution found in Section 6 of Article X. Since Section 148.030 does validly substitute a privilege or excise tax for the former property tax on bank shares, the provisions of Section 148.110 are valid because such section is a recognition of the fact that the tax substituted by the General Assembly as authorized by Section 4(c) of Article X of the Constitution is in place of the previous property tax levied on bank's personal property by levying a tax on bank shares.

Since the tax levied by Section 148.030 is an excise or privilege tax which is applicable to all banking institutions of the State of Missouri, we fail to see where there is any violation of the provisions of Sections 2 or 3 of Article X of the Constitution of Missouri providing that the power to tax shall not be surrendered, suspended or contracted away, except as provided by the Constitution and providing the taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects

Honorable Frank Bild

within the territorial limits of the authority levying the tax by a provision in Section 148.110, providing that the substituted tax is in lieu of personal property taxes of banking institutions and property taxes on shares of banking institutions.

CONCLUSION

It is therefore the opinion of this office that the provisions of Section 148.110, RSMo 1969, do not contravene any provision of the Constitution of Missouri and are valid.

Yours very truly,

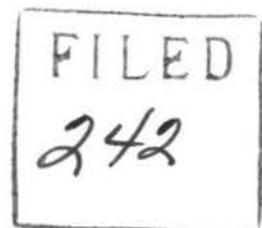
A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

July 6, 1971

OPINION LETTER NO. 242
Answer by letter-Wieler

Mr. Joseph Jaeger, Jr.
Secretary-Treasurer
Mississippi River Parkway Commission
P. O. Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in response to your request for an opinion as to whether or not the Missouri State Highway Commission is prohibited from furnishing "Great River Road" signs for erection along the Mississippi River Parkway route through Missouri. It is our understanding that "Great River Road" signs are those signs which distinctively designate a highway as part of the Mississippi River Parkway road system.

The duties and powers of the Missouri State Highway Department with respect to the Mississippi River Parkway are contained in Sections 226.280 through 226.430, RSMo 1969. The provisions of Section 226.430 prohibit the State Highway Commission from exercising any power, right or duty for the carrying out of the Mississippi River Parkway project, as contemplated by Sections 226.280 through 226.430, without receiving appropriate and sufficient grants of funds from the United States to cover the expenditures involved. The powers and duties of the Missouri State Highway Commission with respect to the Mississippi River Parkway are contained in Sections 226.310 and 226.420, RSMo 1969. Neither of these sections contain any requirement that the State Highway Commission maintain markers and signs along the route of the "Great River Road." Rather, the duty of erecting and maintaining guideboards or marking signs along state highways is placed upon the Highway Commission by Section 227.220, RSMo 1969. The actual highway or highways which comprise the "Great River Road" in Missouri would be state highways under the provisions of Section 226.010(7), RSMo 1969, which defines "state highway" as follows:

Mr. Joseph Jaeger, Jr.

"'State highway', a highway constructed or maintained at the cost of the state, or constructed with the aid of state funds or the United States government funds, or any highway included by authority of law in the state highway system."

Therefore, the only prohibition on the Missouri State Highway Commission with respect to the furnishing of "Great River Road" signs for erection along the "Great River Road" route in Missouri would be the requirements of Section 227.220 that such signs be marking signs or guideboards.

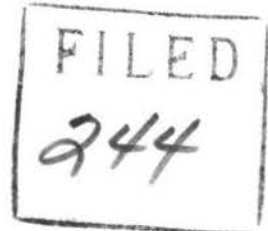
Yours very truly,

JOHN C. DANFORTH
Attorney General

April 8, 1971

Opinion Letter No. 244
Answer by Letter (Klaffenbach)

Honorable Kenneth J. Rothman
Representative, 36th District
Capitol Building - Room 410
Jefferson City, Missouri 65101



Dear Representative Rothman:

This letter is in response to your opinion request which asks whether an elected municipal marshal in St. Louis County must take the course in law enforcement prescribed by Section 66.250, RSMo 1969.

That section provides:

"1. Any person hired after October 13, 1963, to serve as a police officer in a municipal police department in any county of the first class having a charter form of government shall, within six months after beginning such employment, satisfactorily complete a law enforcement officer training course conducted by the county police department or the state highway patrol or any accredited college course for police officers.

"2. Any person required by this section to complete a training course who fails to do so within the six months' period shall not thereafter receive any compensation nor shall he be authorized to act as a police officer until he has satisfactorily completed the course."

We note that this section refers expressly to any "person hired". While various meanings have been given to the word "hire", Words and Phrases, "Hire", p. 149, et seq., nevertheless in each case if at all possible the construction of the

Honorable Kenneth J. Rothman

statute should be consistent with the intent of the legislature. State on Inf. of Taylor v. Kiburz, 208 SW2d, 285 (Mo Sup. 1948).

Clearly the penalty provisions of the section would essentially create a vacancy in the office if the language was held to apply to elected officers. We do not believe that the legislature intended to place additional qualifications on such elected office or to create a cause of forfeiture.

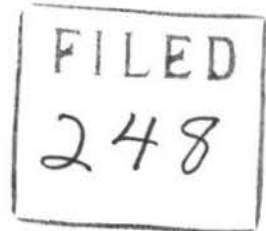
We are accordingly of the view that Section 66.250 does not apply to elected municipal marshals.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answered by Letter - Klaffenbach
OPINION LETTER NO. 248

April 26, 1971



Honorable Maurice Schechter
State Senator
Thirteenth District
Room 427 - State Capitol
Jefferson City, Missouri 65101

Dear Senator Schechter:

This letter is in response to your request for an opinion in which you ask whether subsection 5 of Section 393.130, RSMo 1969, precludes a municipality from voluntarily paying fire hydrant fees.

In particular you refer to a recent request by the City of Ferguson asking that the Public Service Commission permit the St. Louis County Water Company to amend its tariff to allow such payment.

Subsection 5 of Section 393.130 states:

"5. No water corporation shall be permitted to charge any municipality or fire protection district a rate for the placing and providing of fire hydrants for distribution of water for use in protecting life and property from the hazards of fire within such municipality or fire protection district. Nothing herein shall prevent such water corporation from including the cost of placement and maintenance

Honorable Maurice Schechter

of such fire hydrants in its cost basis in determining a fair and reasonable rate to be charged for water. Any such fee or rental charge being made for such fire hydrants whether by contract or otherwise at the time this act shall take effect may remain in effect for a period of one hundred twenty days after this section shall take effect."

We further note that on April 7, 1971, the Public Service Commission denied said application by the City of Ferguson. For your information, a copy of the application and its attachments and the order of the Commission are enclosed.

We note that the Commission in its order concluded "that the parties to this action are attempting to circumvent the statutes and to do what the statutes specifically denies them authority to do."

We note also that the order of the Commission became effective on April 22, 1971, and we understand that no rehearing has been requested under Section 386.500. Therefore, the question is not preserved for judicial review under Section 386.510, RSMo 1969.

The power of a municipality to contract may be express, necessarily implied, or inherent. 10 McQuillin, Municipal Corporations, 3rd Ed., §29.05 p. 230. However, a municipality may not assume a liability where none exists. Id. 241, 244.

It is therefore our view in answer to your question that, in the premises, the city may not voluntarily assume this obligation.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures

SCHOOLS: When a six-director district lying wholly within Jackson County and partly within Kansas City has a school election on a day in which general, special or primary elections are not being held statewide and no election is scheduled in another political subdivision within the school district, Section 162.351, RSMo 1969, does not require either the Kansas City Board of Election Commissioners or the Jackson County Board of Election Commissioners to conduct the school election. Also, Section 162.361, RSMo 1969, does not require voters to register before voting in a school election held in a six-director school district lying only within Jackson County and partly within the city limits of Kansas City for the reason that the school district does not lie wholly within the limits of Kansas City. However, any six-director school district so located which contains a city having not less than ten thousand nor more than fifty thousand inhabitants shall require that all school elections be conducted in accordance with the registration laws applicable to general elections within the city. All voters in the district living outside the limits of such a city must also register to vote if required to register in a general election.

AMENDED OPINION NO. 249

November 24, 1971

Honorable Harold J. Esser
State Representative
Eighteenth District
3 West Glen Arbor Road
Kansas City, Missouri 64114



Dear Representative Esser:

This official opinion is issued in response to your request for a ruling on the following questions pertaining to Sections 162.351 and 162.361, RSMo 1969:

"Part 1. School Districts-Hickman Mills C-1 lying wholly in Jackson County being a six director school district and being incorporated in part in Kansas City and part in Jackson County. Should it comply to the above sections of MRS 69 which requires the election committee of the city of Kansas City or County or both to conduct the election? Are voters required to be registered:

"Part 2. School District Grandview C-4 lying wholly in Jackson County and being a six director School District and having a city which has a population of 17,456 and also includes part of Kansas City? Should it comply to the above Sections of MRS 69 which requires the election committee of the city of Kansas City or county or both to conduct the elections? Do all the voters have to be registered?"

Honorable Harold J. Esser

Hickman Mills C-1 School District

You advise in your request that the Hickman Mills school district is a six-director district wholly within Jackson County and partially within the City of Kansas City.

The first sentence of Section 162.351, RSMo 1969, provides as follows:

"Election commissioners to conduct elections in certain districts. -- In any urban school district in a city having a population of more than three hundred thousand or in any six-director school district located wholly within a city having a population of more than two hundred thousand and less than seven hundred thousand, or in any six-director school district in a county having a population of more than seven hundred thousand the boards of election commissioners of the city or county or both in which the district is located shall conduct any or all school elections held in the district. . . ."

The Hickman Mills school district is not included within the coverage of this sentence. Initially, it is not an urban school district as that term is defined in Section 160.011(15), RSMo 1969. Furthermore, you have advised that the Hickman Mills district does not lie wholly within the City of Kansas City and, therefore, the second clause of the first sentence of Section 162.351 would not apply. Finally, Jackson County has a population of less than seven hundred thousand and, therefore, the third clause of the first sentence does not apply. Consequently, Section 162.351 does not require either the Jackson County Board of Election Commissioners or the Kansas City Board of Election Commissioners to conduct school elections in the Hickman Mills school district.¹

Your second question with regard to the Hickman Mills district is whether Section 162.361 requires that voters in the

Footnote

1. This conclusion is based on two assumptions -- (1) that no political subdivision included in the Hickman Mills district is conducting an election at the same time as the school election and (2) that the school election is not being held at the same time as a general, primary or special state election. If other elections are scheduled at the same time as the school election, see Sections 111.111 and 162.371, RSMo 1969.

Honorable Harold J. Esser

school district election must be registered in order to be eligible to vote.

Subsection 1 of Section 162.361 provides as follows:

"1. The registration laws applicable to general elections in cities having more than seventy-five thousand inhabitants, in counties which have more than seven hundred thousand inhabitants and in counties of the second class which contain a city or part of a city of more than four hundred thousand inhabitants, apply to all elections in six-director school districts within such cities or counties."

As pointed out above, Jackson County has less than seven hundred thousand inhabitants and is a first class, not a second class, county. Therefore, if Section 162.361 is to apply to the Hickman Mills district, it would be because Hickman Mills lies "within" a city having more than seventy-five thousand inhabitants. However, does Hickman Mills lie "within" the City of Kansas City, Missouri, for the purposes of Section 162.361? We believe that it does not.

In Town of Alexandria v. Clark County, 231 S.W.2d 622 (Mo., 1950) the Court considered the meaning of the word "within" for the purposes of determining whether the town of Alexandria could take part in the appointment of the Board of Commissioners of a road district. The town of Alexandria was about ninety percent within the road district and about ten percent without. The applicable statute stated that "the mayor and members of the city council of any city or town within any special road district . . . shall . . . appoint a board of commissioners composed of three persons . . ." The Court concluded as follows:

"As the appellant contends, the word 'within' in the phrase 'any city or town within any special road district thus organized' is not a word of such preciseness as to have but one meaning and 'in construing a statute, we must adopt that meaning always which has application to the subject.' Chicago, S.F. & C. Ry. Co. v. Eubanks, 32 Mo.App. 184, 190. In statutes and statutory construction it is not a 'word of art' with but one meaning -- it has a variety of meanings according to the connection in which it is used. 69 C. J., p. 1311. . . . Webster's International Dictionary defines the adverb 'within' as 'In or into the space or part enclosed by

Honorable Harold J. Esser

the outer surfaces or between encompassing sides; specif.' On the inside or inner side; *** Inside the bounds, as of a region;***.' As a preposition 'within' is defined as 'In the inner or interior part of; inside of; not without; ***. In the limits or compass of; ***.'

"It is true that the statute does not say 'wholly within' which is not synonymous with 'partly' which refers to a situation where a part of a territory is within a district and part of it is without the district. People ex rel. Donegan v. Dooling, 141 App. Div. 31, 125 N.Y.S. 783. But, neither does the statute employ the phrase 'partly within' or 'substantially within' which would be interpolated into the statute if the appellant's interpretation of the statute prevailed. Had the legislature intended that interpretation it could have provided for it; . . ." Id. at 623-624. (Emphasis in the original.)

As in the Town of Alexandria case, Section 162.361 does not say "wholly within". However, "partly" or "substantially" would have to be added before "within" in Section 162.361 to make it applicable to Hickman Mills. Therefore, we conclude that, on the authority of the Town of Alexandria case, voters in the Hickman Mills school district need not register in order to vote in a school district election.

Grandview C-4 School District

You advise that this six-director school district lies wholly within Jackson County; that it also lies partly within Kansas City and contains all of a city having a population of 17,456.

With regard to the application of Section 162.351, we conclude that neither the Jackson County Board of Election Commissioners nor the Kansas City Board of Election Commissioners should conduct elections in the Grandview School District for the same reason as discussed above with reference to the Hickman Mills School District.

With reference to the application of Section 162.361 to the Grandview School District, you advise that this school district contains a city having a population in excess of seventeen thousand inhabitants. Subsection 2 of Section 162.361 provides as follows:

Honorable Harold J. Esser

"2. Except in counties governed by subsection 1, the board of education in every school district containing a city having not less than ten thousand nor more than fifty thousand inhabitants shall require that all school elections shall be conducted in accordance with the laws regulating the registration of voters and general elections within the city; and that qualified voters outside the corporate limits of the city, not required to register for general elections, shall sign an affidavit as to their residence within the school district. The school board shall furnish to all judges of school elections on the day of the election the following affidavit in printed form:

"I, _____, hereby certify that I am a resident of the school district in which I am this day casting my ballot and that my address is _____.

Signed: _____

Dated: _____.

The above affidavit shall be signed by the voter when he casts his ballot at the voting place and shall thereafter be filed by the judges of the election."

Jackson County is a first class county which does not have more than seven hundred thousand inhabitants. Therefore, the Board of Education of the Grandview School District should require that all Grandview School District elections be conducted in accordance with the registration laws pertaining to general elections within the city. Qualified voters in the school district living outside the corporate limits of the city must register in order to vote in a school district election if they are required to register in a general election.

CONCLUSION

Therefore, it is the conclusion of this office that when a six-director district lying wholly within Jackson County and partly within Kansas City has a school election on a day in which general, special or primary elections are not being held statewide and no election is scheduled in another political subdivision within the school district, Section 162.351, RSMo 1969, does not require either the Kansas City Board of Election Com-

Honorable Harold J. Esser

missioners or the Jackson County Board of Election Commissioners to conduct the school election. Also, Section 162.361, RSMo 1969, does not require voters to register before voting in a school election held in a six-director school district lying only within Jackson County and partly within the city limits of Kansas City for the reason that the school district does not lie wholly within the limits of Kansas City. However, any six-director school district so located which contains a city having not less than ten thousand nor more than fifty thousand inhabitants shall require that all school elections be conducted in accordance with the registration laws applicable to general elections within the city. All voters in the district living outside the limits of such a city must also register to vote if required to register in a general election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

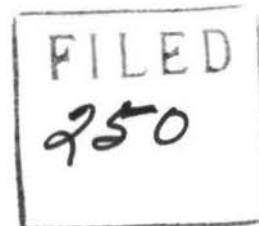
LEGISLATURE:
GENERAL ASSEMBLY:
CONSTITUTIONAL LAW:
INITIATIVE & REFERENDUM:
CONSTITUTIONAL AMENDMENT:

The General Assembly may not constitutionally condition ratification of an amendment to the United States Constitution on approval by the voters of Missouri at a referendum

OPINION NO. 250

April 29, 1971

Honorable John J. Johnson
Senator, District 15
Room 412, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Johnson:

This opinion is in response to your request for an answer as to whether a resolution of the Missouri General Assembly ratifying an amendment to the United States Constitution, which has been proposed by the Congress of the United States and submitted to the legislatures of the several states, may provide as a condition of ratification that the resolution shall not become effective unless and until approved by a majority of the qualified Missouri voters voting upon it at a general election or special election called for that purpose.

We are of the opinion that the Missouri General Assembly cannot constitutionally condition its ratification of an amendment to the Federal Constitution on the approval of that ratification by the voters of this state. We base this opinion on two decisions of the United States Supreme Court, *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920) and *National Prohibition Cases*, 253 U.S. 350, 40 S.Ct. 486, 64 L.Ed. 946 (1920). In the *National Prohibition cases* the court held "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. . . ." *Id.* at 978.

In *Carson v. Sullivan*, 223 S.W. 571 (Mo. banc 1920), the Missouri Supreme Court reached a similar conclusion in a proceeding where an injunction was sought to prohibit preparation and certification of a ballot title to a proposed referendum on Senate Joint and Concurrent Resolution No. 1 adopted by the Fiftieth General Assembly, ratifying the Eighteenth Amendment to the Constitution of the United States. In reversing the decision of the lower court denying the injunction, the Missouri Supreme Court stated:

Honorable John J. Johnson

"A recent decision of the Supreme Court of the United States (State of Rhode Island v. Palmer, [National Prohibition Cases] 252 [sic] U. S. ___, 40 Sup. Ct. 486, 64 L. Ed. ___), has foreclosed all discussion of this question in holding that the referendum provisions of state Constitutions and statutes cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to that Constitution, and that the Eighteenth Amendment, prohibiting the manufacture, etc., of intoxicating liquors for beverages, is within the power to amend reserved by article 5 of the United States Constitution; in other words, that the 'Legislatures of three-fourths of the * * * states,' as the words are employed in that article (5), has reference to legislative bodies as they were known at the time of the adoption of the Constitution, and not by any other body or the people generally. The action of the respondents, therefore, in attempting to refer the legislative ratification of the Eighteenth Amendment to the people, was without authority, and the trial court was in error in so ruling. From this it follows that the appellant is entitled to the relief sought.

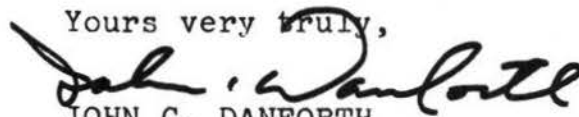
"We therefore reverse and remand this cause, with directions to the circuit court to set aside its judgment and enter a decree herein in favor of the appellant, perpetually enjoining the respondents from attempting to refer the legislative ratification of said Eighteenth Amendment to the Constitution of the United States to the voters of the state for approval or rejection. . . ." Id. at 572

CONCLUSION

It is the opinion of this office that the General Assembly may not constitutionally condition ratification of an amendment to the United States Constitution on approval by the voters of Missouri at a referendum.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

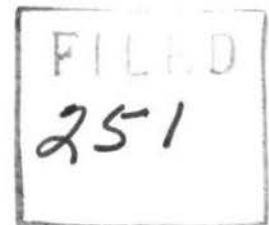
Yours very truly,


JOHN C. DANFORTH
Attorney General

December 22, 1971

OPINION LETTER NO. 251
Answer by letter-Wieler

Honorable Earl L. Sponsler
Representative, District 126
R.F.D. 2
Cabool, Missouri 65689



Dear Representative Sponsler:

This is in response to your request for an opinion on the following specific question:

"Does the Missouri Seed Law (R.S. Mo. Sections 266.011-266.120) cover tree seeds to the extent that seeds certification standards may be established?"

In Section 266.021(2), RSMo 1969, "agricultural seeds" are defined as the ". . . seeds of grass, forage, cereal and fiber crops and any other kinds of seeds commonly recognized within this state as agricultural or field seeds, except Johnson grass." As can be seen, tree seeds are not specifically included within this definition. However, it has been suggested that trees are fiber crops and, as such, are includable.

Our research discloses no case defining the term "fiber crops" so as to include trees. In the absence of any such case, it is our opinion that the term refers to those crops commonly used in the production of clothing fibers, e.g., flax and cotton.

It was further suggested that other states allow the certification of tree seeds under the provisions of their seed law, specifically Georgia and New York. However, a check of Georgia and New York law reveals that tree seeds are specifically defined and provided for within the state seed laws. Consolidated Laws of New York, annotated, Agricultural and Market Law, Section 136, sub. 3, and Code of Georgia, annotated, Agriculture, Section 5-2401, et. seq.

Honorable Earl L. Sponsler

Finally, we note that the Commissioner of Agriculture in Missouri pursuant to his rule making power under Section 266.091, RSMo 1969, has defined "agricultural seeds" as those listed in the Federal Seed Act, with the exception of Johnson grass. Rule 4 of the Missouri Seed Law Regulations. The Federal Seed Act does not include trees in its list of "agricultural seeds" and tree seeds have not been added to the list by the Secretary of Agriculture pursuant to his rule and regulation making power. 7 U.S.C.A. Section 1551, et. seq.

Therefore, it is our opinion that tree seeds cannot be certified as "agricultural seeds" under the provisions of the Missouri Seed Law, as currently enacted.

Yours very truly,

JOHN C. DANFORTH
Attorney General

*See also Hendrix v. Lock
482 SW 2d 427*

CRIMINAL LAW:
CRIMINAL PROCEDURE:
FINES:
PRISONERS:
JAILS:

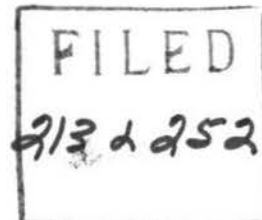
1. An indigent person may not be held in or committed to jail for failure to make immediate payment of a fine if he lacks the means to make such payment. 2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay. 3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment. 4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony. 5. Courts have authority to permit the payment of fines in installments. 6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine. 7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.

OPINION NOS. 213 and 252

October 27, 1971

Honorable James G. Baker
Representative, District 3
104 East 41st Street
Kansas City, Missouri 64111

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri 64469



Gentlemen:

This opinion is in response to your respective inquiries concerning the effect of the holding of the United States Supreme Court in Tate v. Short, 401 U.S.395, 28 L.Ed.2d 130, 91 S.Ct. 668 (1971).

Inasmuch as the questions involve similar problems, we have combined your requests into one opinion. The questions posed by Mr. Paden are:

"... 'How will the Magistrate Courts impose sentences and/or fines in case of traffic violations where the defendant alleges himself to be indigent and unable to pay a fine'.

"... 'Do the statutes of the State of Missouri permit the imposition of installment

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Honorable Robert B. Paden

finances and in the event that the defendant fails to meet one or more installments, who is responsible [sic] for the unpaid installment and what can the court do about it if the installment is unpaid'?"

The questions posed by Representative Baker are similar in content to the above.

First of all we wish to note that Senate Bill No. 227 of the 76th General Assembly effective September 28, 1971, repealed Sections 71.220 and 543.270, RSMo 1969, and enacted in lieu thereof two sections bearing the same number designations. The new legislation states:

"71.220. The various cities, towns and villages in this state, whether organized under special charter or under the general laws of the state, are hereby authorized and empowered to, by ordinance, cause all persons who have been convicted and sentenced by the mayor, judge of the police court, or other court having jurisdiction, for violation of ordinance of such city, town or village, whether the punishment be by fine or imprisonment, or by both, to be put to work and perform labor on the public streets, highways and alleys or other public works or buildings of such city, town or village, for such purposes as such city, town or village may deem necessary. And the marshal, constable, street commissioner, or other proper officer of such city, town or village, shall have power and be authorized and required to have or cause all such prisoners as may be directed by the mayor, or other chief officer of such city, town or village, to work out the full number of days for which they may have been sentenced, at breaking rock, or at working upon such public streets, highways or alleys or other public works or buildings of such city, town or village as may have been designated. And if the punishment is by fine, and the fine be not paid, then for every ten dollars of such judgment the prisoner shall work one day. And it shall be deemed a part of the judgment and sentence of the court that such prisoner may be worked as herein provided. When a fine is assessed for violation of an ordinance, it shall be within the discretion of the judge, or other official,

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Honorable Robert B. Paden

assessing the fine to provide for the payment of the fine on an installment basis under such terms and conditions as he may deem appropriate.

"543.270. When any person shall be unable to pay any fine and costs assessed against him the magistrate shall have power, at the request of the defendant, to commute such fine and costs to imprisonment in the county jail, which shall be credited at the rate of ten dollars of such fine and costs for each day's imprisonment. When a fine is assessed by a magistrate, it shall be within his discretion to provide for the payment of the fine on an installment basis under such terms and conditions as he may deem appropriate."

Therefore, it is clear at the outset that installment payments are authorized by Senate Bill No. 227.

In analyzing the holding of the Supreme Court of the United States in Tate v. Short, we must first review the holding of the United States Supreme Court in Williams v. Illinois, 399 U.S. 235, 26 L.Ed.2d 586, 90 S.Ct. 2018 (1970).

In Williams v. Illinois, the court held that where the maximum term of imprisonment for petty theft was one year, the effect of the sentence imposed required appellant to be confined for 101 days beyond the maximum period of confinement fixed by the statute since he could not pay the fine and costs. The court held that where the aggregate imprisonment exceeded the maximum period of confinement fixed by statute, which resulted directly from an involuntary non-payment of a fine or court costs, there was an impermissible discrimination resting upon ability to pay.

In reaching this conclusion, the court stated at 399 U.S., 1.c. 241-242 et seq.:

"A State has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense. However, once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then

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subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

". . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment."

However, the court continued at l.c. 243-244 noting that:

"It bears emphasis that our holding does not deal with a judgment of confinement for non-payment of a fine in the familiar pattern of alternative sentence of '\$30 or 30 days.' We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

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And the court added by footnote:

"What we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. . . . Thus inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by the statute simply because of inability to pay."

Shortly after the Supreme Court decided the case of Williams v. Illinois, which we have quoted above, it also decided Morris v. Schoonfield, 399 U.S. 508, 26 L.Ed.2d 773, 90 S.Ct. 2232 (1970). In the Morris case the court per curiam vacated judgment and remanded for reconsideration on the basis of the Williams case. Four members of the court agreeing with the decision stated at 399 U.S., 1.c. 509:

"However, I deem it appropriate to state my view that the same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

"As I understand it, Williams v. Illinois does not mean that a State cannot jail a person who has the means to pay a fine but refuses or neglects to do so. Neither does it finally answer the question whether the State's interest in determining unlawful conduct and in enforcing its penal laws through fines as well as jail sentences will justify imposing an 'equivalent' jail sentence on the indigent who, despite his own reasonable efforts and the State's attempt at accommodation, is unable to secure the necessary funds. But Williams means, at minimum, that in imposing fines

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as punishment for criminal conduct more care must be taken to provide for those whose lack of funds would otherwise automatically convert a fine into a jail sentence."

Returning to Tate v. Short, we note that the question under consideration involved an appeal from a corporation court in the State of Texas from fines accumulating \$425 on nine convictions. The corporation court under Texas law had no jurisdiction to impose prison sentences but committed the defendant to the municipal prison farm according to the provisions of a state statute and a municipal ordinance which required that the defendant remain there a sufficient time to satisfy the fines at the rate of five dollars for each day. The court stated at 401 U.S., 1.c. 397-398:

"Although the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.
. . ."

The court continued at 1.c. 399:

". . . Since Texas has legislated a 'fines only' policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State. . . .

* * *

". . . Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."

It is clear from the foregoing that at this time the opinions of the Supreme Court of the United States prohibit the jailing of

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Honorable Robert B. Paden

an indigent person for the involuntary nonpayment of a fine for a period in excess of the maximum period of confinement allowed by law (Williams v. Illinois); that an indigent cannot be jailed for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine (Morris v. Schoonfield); and, that where a state has legislated a "fines only" policy, the court cannot arbitrarily limit the punishment to payment of the fine if one is able to pay it yet convert the fine into a prison term for an indigent defendant. (Tate v. Short).

Thus, under Senate Bill No. 277 quoted above and the holdings of the Supreme Court of the United States, an indigent is to be offered the alternative of paying a fine in installments. The determination of indigency must be made after a hearing giving the accused an opportunity to show that he is unable to pay his fine and it is our view that the oral testimony of the defendant with respect to his indigency may satisfy his burden of proceeding in that respect. Obviously, a defendant who makes a false statement as to material facts concerning his inability to pay a fine may be subject to various sanctions.

With respect to the question concerning whether an indigent person may be imprisoned for the involuntary nonpayment of installments of a fine, we note that recent decisions in other states suggest divergent views. That is, in In Re Antazo, 473 P.2d 999 (1970) the Supreme Court of California stated that the proper use of imprisonment for nonpayment of a fine presupposes an ability to pay and a contumacious offender. On the other hand, in State v. De-Bonis, 276 A.2d 137 (1971) the Supreme Court of New Jersey after a lengthy analysis of the Williams case concluded that a fine was a part of the punishment and therefore an indigent could be imprisoned for involuntary nonpayment of installments.

Inasmuch as neither the Supreme Court of the United States nor the Supreme Court of Missouri have as yet resolved the question as to whether an indigent can be imprisoned for involuntary nonpayment of installments of a fine, we are of the view that we must leave that question to the courts.

CONCLUSION

It is the opinion of this office that:

1. An indigent person may not be held in or committed to jail for failure to make immediate payment of a fine if he lacks the means to make such payment.

Honorable James G. Baker
Honorable Robert B. Paden

2. A person who claims that he is unable to pay a fine is entitled to a hearing to determine his ability to pay.

3. A person who fails to pay a fine which he is able to pay may be committed to jail for voluntary nonpayment.

4. The burden of proof of inability to make an immediate payment of a fine is on the person upon whom the fine is assessed and may be satisfied by such person's testimony.

5. Courts have authority to permit the payment of fines in installments.

6. An indigent cannot be sentenced to a longer period in jail than the maximum period of imprisonment prescribed for the offense because of his involuntary failure to pay a fine.

7. If a fine only is prescribed for an offense, an indigent cannot be sentenced to jail for his involuntary nonpayment of the fine.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

May 4, 1971

Answer by Letter - Klaffenbach

OPINION LETTER NO. 253

Honorable Robert Ellis Young
Missouri State Representative
District 133
208 West Macon Street
Carthage, Missouri 63846

Dear Representative Young:

This is a letter in answer to your opinion request in which you ask the following questions:

"1. Does a police officer or Sheriff in Jasper County or cities have the right to arrest or detain a person he believes to be mentally ill or who is represented to him to be mentally ill, and take this person to State Hospital No. 3, or a local hospital, where he has cause to believe this person is mentally ill?

"2. As Jasper County has no mental hospital or detention home, can he confine the person in the county jail and later, within a reasonable time, take the person to State Hospital No. 3, under the emergency procedures of the Mental Health Code?

"3. Is there any hourly limit on the time this person can be held in jail pending transportation to Nevada, or a public hospital?

"4. Is St. John's Medical Center, Joplin, which has a psychiatrist on its staff, a hospital or institution within the definitions of Chapter 202 of the Mental Health Code?

"5. Is Ozark Psychiatric Center, Joplin, which has some federal sponsorship and support, a hospital or institution within the meaning of Chapter 202. The Center has psychiatrists and separate examining (sic) rooms but no maximum security rooms.

Honorable Robert Ellis Young

"6. After commitment application, can the Probate Court order psychiatric examination at the Center's facilities without having to send these people to Nevada where there is no prior medical certificate?

"7. Does the Doctor have to have a Court order before he can make an examination? For instance, in the jail or in the emergency room?"

With respect to your first question concerning whether or not a police officer or sheriff has the right to arrest or detain a person he believes to be mentally ill, we call your attention to Sections 202.800 and 202.803, RSMo 1969. Section 202.800 states:

"1. Any individual may be admitted for temporary confinement to a hospital upon:

"(1) Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill or is a retarded person at least seventeen years of age and not under the jurisdiction of a juvenile court and, because of his mental condition, is likely to injure himself or others if not immediately restrained.

"2. An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three days after the date of examination.

"3. Such a certificate, upon endorsement for such purpose by a judge of any court of record of the county in which the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application."

Honorable Robert Ellis Young

Section 202.803 RSMo 1969 states:

"1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that

"(1) The individual is mentally ill, or is a mentally retarded person at least seventeen years of age and not under the jurisdiction of a juvenile court, and, because of his mental condition, is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician; or

"(2) The individual, who has been certified under section 202.800 as likely to injure himself or others, cannot be allowed to remain at liberty pending the endorsement of the certificate as provided in that section.

"2. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the officer's belief."

Section 202.010 RSMo 1969 defines hospital as:

"'Hospital' is a public or private hospital or medical facility or part thereof, equipped to provide inpatient care and treatment for the mentally ill or mentally retarded."

In the absence of a medical certification which is required by Section 202.800, as noted above, it would appear that the temporary confinement to which you refer would be authorized by Section 202.803 and that such a police officer, and this would include of course a sheriff of a county, has the authority to take the person defined in subsection 1 of that section into custody and apply to a hospital for his admission and transport him thereto for temporary confinement if he has reason to believe that such a person because of his mental condition is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician. The clear language of the statute therefore answers your question. A private hospital, of course, can be utilized for this purpose as long as the hospital

Honorable Robert Ellis Young

meets the requirements of the definition of "hospital" which we have noted above, that is, one which is equipped to provide in-patient care and treatment for the mentally ill.

In answer to your second question concerning whether such a person may be taken to the county jail, our answer is that under normal circumstances this should not be done. While we do not anticipate all the circumstances that may arise, we believe that the language of the sections that we have quoted above indicate a legislative intent that such an individual be taken to a "hospital" and not to a jail. Therefore, in answer to your second question, it is our view that Chapter 202 does not provide for confinement in a jail; although, at the same time, it is quite logical that if a person has committed a crime he may be taken to jail and at that point a determination may be made concerning his admission or commitment to a mental institution and thereafter the procedures followed as we have indicated pursuant to Chapter 202.

We also wish to call to your attention the provisions of the Probate Code, Section 475.355, with respect to the apprehension and restraint of dangerous incompetents which states:

"1. If it appears to any judge of a court of record, other than the judge of a magistrate court, that any person, by reason of his mental condition is so far disordered in his mind as to endanger his own person or the persons or property of others, and that such person is not confined by the person having charge of him, or that there is no person having such charge and that information under section 475.075 or chapter 202, RSMo, has been filed, the judge may cause the person to be apprehended and may employ any person to confine him in some suitable place until the earliest reasonable date on which a hearing may be had on the information in the probate court and judgment rendered thereon.

"2. The expenses of confinement under this section shall be paid by the guardian out of the estate of the incompetent or by the person bound to provide for and support the incompetent, or the same shall be paid out of the county treasury upon the order of the county court after the same is duly certified by the probate court."

Honorable Robert Ellis Young

Under the last quoted section the probate judge has authority to confine such a person in "some suitable place." Whether a jail is a suitable place is a question of fact under the particular circumstances insofar as that section is concerned.

In answer to your third question concerning whether or not there is any hourly limit on the time such a person can be held in jail pending transportation to a hospital, we believe we have answered this question in part by our answer to your last question. However, under Chapter 202, and consistent with the basic tenets of fairness and due process, we believe that it is the legislative intent that no time be lost in transporting the person to a "hospital" under such circumstances.

In answer to your fourth and fifth questions concerning whether or not certain institutions are hospitals within the definitions of Chapter 202, we have noted the definition of hospital and it is a question of fact as applied to the definition whether or not such a "hospital" or medical facility or part thereof is "equipped to provide inpatient care and treatment for the mentally ill." If it is not equipped to provide inpatient treatment, then it does not come within the definition of hospital. We do not attempt to answer your question precisely with respect to the two particular institutions, inasmuch as the answer to those questions involve questions of fact, not properly the subject of a legal opinion, and as you realize, facts will or may change from time to time.

In answer to your sixth question concerning whether or not after commitment application the Probate Court can order psychiatric examination at a private medical facility without having to send such a person to Nevada State Hospital, it is our view that the provisions of Section 202.807 RSMo 1969 with respect to the involuntary commitment of the mentally ill do not require psychiatric examination by state hospital personnel and clearly subsection 3 of Section 202.807 provides that at least one of the witnesses at the hearing shall be a licensed and reputable physician who has examined the individual within twenty days prior to the filing of the application. In the definition Section 202.010(11) "licensed physician" is defined as:

"'Licensed physician' is a physician licensed under the laws of the state to sign birth and death certificates or a medical officer of the government of the United States while in this state in the performance of his official duties;"

The physician conducting such an examination therefore need not be a state hospital physician.

Honorable Robert Ellis Young

In answer to your seventh question with respect to whether or not a doctor has to have a court order before he can make an examination, we note that in this instance the examinations contemplated under the above sections are mental examinations and do not necessarily include physical examinations. This means, therefore, that a physician can make a diagnosis by observation or conversation with a reasonable degree of certainty and at least sufficient to meet the requirements of certification and testimony. Under normal circumstances, a court order would not be required and it appears from the language used in such sections that the legislature did not anticipate that a court order would be required for examinations made pursuant to emergency commitments. Further, under Section 202.807 with respect to hospitalization on court order, since the physician who is a witness at the hearing must have examined the individual "within twenty days prior to the filing of the application," it was also anticipated by the legislature that such a witness may have made the examination at a time before the matter was called to the attention of the court. Therefore, we repeat that it is our view, at least in general answer to your question, that these provisions did not anticipate that a court order would be required for such an examination under normal circumstances.

Very truly yours,

JOHN C. DANFORTH
Attorney General

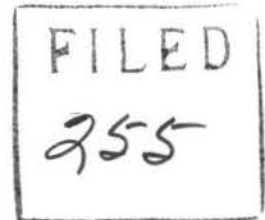
Taxation (cities
towns and villages):
Assessments:

(1) When the provisions of Section 137.073, RSMo 1969, become applicable because of an increase in the assessed valuation of property in a county, the lowering of the rate of a city library tax levy shall be only to the extent necessary to produce substantially the same amount of taxes for the library as previously estimated to be produced by the original levy, and the lowering of the rate of levy shall be subject to the limitation that the levy for the library shall not be reduced below a point that would entitle it to participate in state funds. (2) Revising the rates of levy so that the rate of levy applicable to the library will produce substantially less than the amount of taxes previously estimated to be produced by the original levy and so that rates of levy for other city purposes will produce substantially more taxes than had been estimated to be produced by the original levy is not in conformity with Section 137.073, RSMo 1969, even though the total city taxes produced by the revised rates of levy may equal the total taxes previously estimated to be produced by the original levy.

July 9, 1971

OPINION NO. 255

Honorable Robert Devoy
State Representative
Ninety-Second District
111 East Brooks Street
Brookfield, Missouri 64628



Dear Representative Devoy:

This is in response to your request for an opinion construing Section 137.073, RSMo 1969, as to:

"... whether a city of the third class has the authority to decrease the rate of levy of the city library to a rate that will produce substantially less revenue than was produced in the year prior to the increase in assessed valuation and at the same time leave the other rates of levy of the city at a point where they will produce substantially more revenue than was received in the year prior to the increase in assessed valuation."

Section 137.073, RSMo 1969, provides:

"Whenever the assessed valuation of real or personal property within the county has been increased by ten percent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the

Honorable Robert Devoy

county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds." (Emphasis added.)

We assume that the tax rate for general city purposes was set by the city council before it was determined that the provisions of Section 137.073 were applicable to such city. See Opinion No. 49, rendered to J. Marcus Kirtley, March 8, 1956, a copy of which is enclosed.

The law requires that "taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy." (Emphasis added.) Use of the word "authorities" indicates an application of the requirement to every taxing authority; and, use of the word "rates" in the term "rates of levy" indicates application of the requirement to every rate of levy.

These indications are strengthened by the provision of the law that "where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the

Honorable Robert Devoy

extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation." This provision was included in the law because of the additional factor of change in apportionment of state school moneys due to changed valuation to make certain that, after the lowering of its rate of tax levy, a school district will receive in the combination of taxes and state school money substantially the same amount of money as previously estimated would be received from the combination of the original tax levy and state school money.

These indications are further strengthened by the provision that "no levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds." This also shows the intention of the legislature that the requirement for lowering the rates of levy will not result in loss of state funds to public schools and libraries. See Opinion No. 72 -1955, a copy of which we attach.

The legislature puts libraries in the same category as public schools in prohibiting the reduction in levy below a point that would entitle them to participate in state funds. The general requirement of lowering rates of levy to the extent necessary to produce substantially the same amount of taxes as previously estimated to be produced by the original levy, has been modified with respect to public schools, only as necessary to avoid loss from reduction in apportionment of state school moneys due to changed valuation. This general requirement appears to set the pattern for other rates of levy and applies to libraries, provided that such reduction shall not be below a point that would entitle the libraries to participate in state funds.

CONCLUSION

It is the opinion of this office that:

(1) When the provisions of Section 137.073, RSMo 1969, become applicable because of an increase in the assessed valuation of property in a county, the lowering of the rate of a city library tax levy shall be only to the extent necessary to produce substantially the same amount of taxes for the library as previously estimated to be produced by the original levy, and the lowering of the rate of levy shall be subject to the limitation that the levy for the library shall not be reduced below a point that would entitle it to participate in state funds.

(2) Revising the rates of levy so that the rate of levy applicable to the library will produce substantially less than the amount of taxes previously estimated to be produced by the original levy and

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so that rates of levy for other city purposes will produce substantially more taxes than had been estimated to be produced by the original levy is not in conformity with Section 137.073, RSMo 1969, even though the total city taxes produced by the revised rates of levy may equal the total taxes previously estimated to be produced by the original levy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Carroll J. McBride.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure:

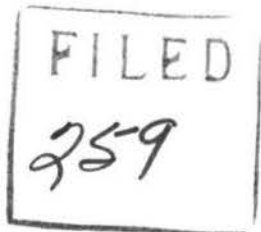
Opinion No. 49, Kirtley, 3-8-56
Opinion No. 72, Price, 8-9-55

June 30, 1971

OPINION LETTER NO. 259

Answer by letter-C. B. Blackmar

Mr. Dexter D. Davis, Commissioner
Department of Agriculture
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Davis:

This official opinion is issued in response to your request in which you ask whether certain swine-buying stations or collecting points are excluded from the definition of "livestock markets" in Section 277.020(2), RSMo 1969, defining that term as follows:

"'Livestock sale or market', a place of business or place where livestock is concentrated for the purpose of sale, exchange or trade made at regular or irregular intervals, whether at auction or not, except this definition shall not apply to markets operating under the supervision of the Federal Public Stockyards Inspection Service or to any public farm sale or purebred livestock sale, or to any sale, transfer, or exchange of livestock from one person to another person for movement or transfer to other farm premises or directly to a licensed market;"

In Opinion No. 226, July 21, 1965, copy of which is enclosed, this office commented on the broad statutory definition as set out above and expressed the conclusion that swine-buying stations as described therein are "livestock markets" which are required to be licensed.

You advise us that there are unlicensed swine-buying stations or collecting points to which producers ship swine and at which representatives of packing companies sort, grade and pay for the swine.

Mr. Dexter D. Davis

The operators claim that they are not within the above definition and are therefore exempt from the operations of Chapter 277, RSMo 1969, on the basis of facts they claim to exist as follows: (1) only members of a particular organization may use the stations, and they are not available to hog raisers in general; (2) the price is determined in advance by negotiation between the organization and the packing companies; (3) no swine received at the station are returned to the farms, and all are shipped to packing houses for presumed slaughter.

It is apparent that these stations are places where "livestock is concentrated for purposes of sale." It makes no difference that the price may be determined by negotiations elsewhere. The sole purpose for the existence of the station is to facilitate the sale by producers of their swine. In accordance with the reasoning of Opinion No. 226 then, the stations are "livestock markets," unless they fall within one of the exemptions in Section 277.020(2), RSMo, above.

The definition contains nothing which limits the application of Chapter 277, RSMo, to facilities available to the general class of swine raiser. Nor does it exclude from its operations stations from which no swine are returned to farms and all are shipped to packing houses.

Our conclusion that no exemption is demonstrated by these circumstances is in accord with the purpose of Chapter 277, RSMo, as shown by its several sections. Section 277.100, RSMo 1969, provides for sanitation regulations, including regulations designed to control the spread of communicable disease. Section 277.080, RSMo 1969, calls for a bond to protect users, and this would be important in a situation in which money is paid to the operator for later disbursement to the producer. Section 277.050, RSMo 1969, provides procedures for the suspension or revocation of the license of a station for violation of the law. All of these problems might exist at a station such as you describe, just as fully as at a facility as described in Opinion No. 226. We consider that the legislature purposely made Section 277.020(2), RSMo, broad so as to give the state veterinarian broad powers of inspection and supervision.

We have considered the opinions furnished us of the Attorneys General of Kansas and Kentucky, in which each concludes that hog-buying stations which do not cater to the public are not subject to regulation under the statutes of his state. The statutes involved are significantly different from the Missouri statute which, as we have seen, contains no language limiting its operation to public facilities.

Mr. Dexter D. Davis

A facility at which livestock is concentrated for purposes of sale is not rendered exempt from the requirements of Chapter 277, RSMo, even though it is available only for members of a particular organization, and not to swine producers in general; prices are negotiated elsewhere between the organization and packing companies; and all swine received at the facility are shipped to packing houses for presumed slaughter with none being returned to farms.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 226
7-21-65, Stiles

September 16, 1971

OPINION LETTER NO. 262
Answer by letter-Wieler

Honorable Donald L. Manford
Senator, District 8
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This is in response to your request for an opinion as to whether the board of election commissioners can consolidate precincts for the annual school district election for the Center School District No. 58 when no other political subdivision is involved.

Based upon our correspondence with you, it is our understanding that Center School District No. 58 is a six-director school district located wholly within the city limits of Kansas City, Missouri. This being so, elections in this district are governed by the provisions of Section 162.351, RSMo 1969, which provides that all elections conducted in a six-director school district located wholly within a city having a population of more than two hundred thousand and less than seven hundred thousand shall be conducted by the board of election commissioners of the city wherein such district is located.

Inasmuch as we have been advised that Center School District No. 58 lies wholly within the City of Kansas City, Missouri, all elections within that school district would be conducted by the Kansas City board of election commissioners pursuant to the provisions of Chapter 117, RSMo 1969. Section 117.210, RSMo 1969, in pertinent part, provides:

"In any election other than general and primary elections, state and county, and municipal elections, regular and primary, the board, in its discretion, shall have the power and authority for such election:

Honorable Donald L. Manford

(1) To consolidate two or more precincts within any ward of the city into one voting district, and for each such voting district to designate one set of judges and clerks theretofore appointed and commissioned to serve in the precinct comprising such voting district;"

Therefore, it is our opinion that the Kansas City board of election commissioners can consolidate voting precincts for the annual election in the Center School District No. 58 if no other election were involved.

Yours very truly,

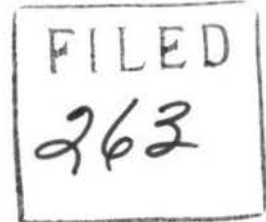
JOHN C. DANFORTH
Attorney General

May 5, 1971

OPINION LETTER NO. 263

Answer by Letter - Klaffenbach

Honorable Richard M. Webster
Missouri State Senate
Room 429, State Capitol
Jefferson City, Missouri 65101



Dear Senator Webster:

This letter is in answer to your request for an opinion respecting the following statement and questions presented to you by one of your constituents:

"In Newton County nearly all misdemeanor cases are handled by the Magistrate Court. The Uniform Traffic Ticket is not used as an information but, instead, a separate information is drawn for each case. All copies of the Uniform Traffic Ticket are attached to the information, as is a copy of the arresting officer's report to the Prosecuting Attorney when the case is filed in the Magistrate Court by the Prosecuting Attorney. The Uniform Traffic Ticket is used pursuant to RSMo. 302.225 to notify the Director of Revenue so that a person's points against his driver's license can be computed. The copy of the Arrest Report to Prosecuting Attorney is read by the Judge after a plea of guilty is entered.

"The problem that presents itself is that it is the contention of the Magistrate Judge that only his docket sheet and the information are matters of public record and that a copy of the Officer's Report to the Prosecuting Attorney, which is used after a plea of guilty, and the Uniform Traffic Ticket, which is sent to the Director of Revenue, are not.

Honorable Richard M. Webster

"This procedure makes it impossible for area newspapers to obtain addresses of defendants convicted in the Magistrate Court. As a result, newsmen go to the Prosecuting Attorney to obtain this information from his files.

Specifically, we would like an opinion on the following, based on the facts set out above:

- 1) Are the Uniform Traffic Tickets, which are not used as informations but only used to inform the Director of Revenue with respect to points, a Public Record when attached to an information when filed in the Magistrate Court?
- 2) Is the Officer's Report to Prosecuting Attorney, which is attached to an information when it is filed in the Magistrate Court, Public Record?
- 3) Is the Prosecuting Attorney under a duty to the press to disclose addresses of defendants charged or convicted of traffic offenses?
- 4) Is the Magistrate Judge or his Clerk under a duty to the press to disclose the names and addresses of persons charged or convicted of traffic offenses, and other misdemeanors, when they have access to this information?"

Your informant has noted Sections 109.180 RSMo 1969 and 302.225 RSMo 1969.

Section 109.180 relating to the disclosure of public records states:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon con-

Honorable Richard M. Webster

viction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Section 302.225 relating to records of convictions states:

"1. Every court having jurisdiction over offenses committed under this chapter, or any other law of this state, or county or municipal ordinance, regulating the operation of vehicles on highways, shall, within ten days thereafter, forward to the director upon forms furnished by the director a record of the conviction of any person in the court for a violation of this chapter or for any moving traffic violation under the laws of this state or county or municipal ordinances.

"2. Whenever any person is convicted of any offense or series of offenses for which this chapter makes mandatory the suspension or revocation of the operator's or chauffeur's license of such person by the director, the circuit court or magistrate court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses, then held by the person so convicted, and the court shall within ten days thereafter forward the same, together with a record of the conviction, to the director.

"3. No municipal court or municipal official shall have power to revoke any operator's license or chauffeur's license."

We understand from the question that the inspection issue involves only post-conviction inspection and therefore limit our views accordingly.

Supreme Court Rule 37.01 provides that Rules 37.46-37.50, pertaining to traffic cases, shall also apply to magistrate and certain other courts in all traffic cases in which such courts have original jurisdiction.

Rule 37.46 states:

"(a) Form. In Traffic Cases, the complaint or information and summons shall be in the form, known as the "Uniform Traffic Ticket" substantially the

Honorable Richard M. Webster

same as set out in Rule 37.1162, such form to be used as is applicable and in accord with the law of the particular jurisdiction. The Uniform Traffic Ticket shall consist of four parts: (1) the complaint or information printed on white paper; (2) the abstract of court record for state licensing authority which shall be a copy of the complaint or information printed on yellow paper; (3) the police record, which shall be a copy of the complaint or information printed on pink paper; and (4) the summons printed on white stock. Their reverse sides shall be set out in said form, with such additions or deletions as are necessary to adapt the Uniform Traffic Ticket to the jurisdiction involved except that where a municipality or municipal or magistrate's court has established a Violations Bureau, the court may determine which offenses may be heard by the court only. The notice and appearance, plea of guilty and waiver shall be printed on the summons.

"(b) When Used. The complaint or information form shall be used in Traffic Cases, whether the complaint is made by a peace officer or by any other person or the information is made by the prosecutor.

"(c) Reports. Every officer receiving Uniform Traffic Tickets from any magistrate or judge or clerk of any court, or from any governmental agency authorized by law or these rules to issue such Uniform Tickets, or to which such authority is delegated by any court, shall report to such issuing authority, the disposition of all such Uniform Tickets so received and shall be responsible to such court or judge or agency for their proper use and disposition."

Rule 37.466 provides that nothing in Rule 37.46 shall prevent the filing of a more detailed information or an amended information by the prosecuting attorney. Your question notes in this instance that the prosecutor files a separate information with the ticket.

For your information we enclose our opinions No. 56, dated February 2, 1965 to Parrish, No. 2, dated March 5, 1963 to Bates, and No. 90, dated April 27, 1953 to Turnbull.

Honorable Richard M. Webster

We have noted that Section 302.225 requires the court to send a record of conviction to the director of revenue. It is our understanding that part (2) of the Uniform Traffic Ticket, which is by Supreme Court Rule an abstract of the court record, is accepted by the director of revenue under Section 302.225. Accordingly such a record is a public record and open to public inspection.

We are also of the view the conclusions we reached in the enclosed opinions with respect to arrest and investigation reports apply in this instance to reports made to the prosecuting attorney by the police and that such reports are not records open to general public inspection.

In answer to the third and fourth questions concerning whether the prosecuting attorney and the magistrate judge or his clerk are under a duty to disclose the names and addresses of persons charged or convicted of traffic offenses or other misdemeanors, we know of no statute or rule imposing such a duty and do not believe that such a duty can be implied.

Very truly yours,

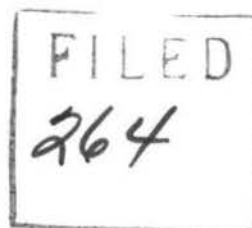
JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 56, 2/2/65, Parish
Opinion No. 2, 3/5/63, Bates
Opinion No. 90, 4/27/53, Turnbull

June 22, 1971

Answered by Letter - Walt Nowotny
OPINION LETTER NO. 264



Honorable John W. Reid, II
Prosecuting Attorney
Madison County
Madison County Court House
148 East Main Street
Fredericktown, Missouri 63645

Dear Mr. Reid:

This is in reply to your request for an official opinion from this office concerning the question whether individuals are authorized to float or fish in the Little St. Francis River or from the bank of such stream, or camp on the bank of the river or on a sand or gravel bar of the river, and also asking whether a land owner of real estate adjacent to the river can stretch barbed wire across the river in order to keep his cattle from going onto adjoining land.

The questions you have asked depend upon whether or not the Little St. Francis River is either "navigable" for purposes of determining title to the bed of the river, or whether the river is subject to a public easement. Elder v. Delcour, 269 S.W.2d 17 (Mo. Banc. 1954).

If the river is "navigable", the state owns the bed of the river; but if it is "non-navigable" title is in the owner of record. Elder v. Delcour, *supra*. The court in Elder stated the test for determining "navigability" and held that the upper Meramec was not "navigable".

Honorable John W. Reid, II

The court then went on to state the tests for determining whether the public has a right of easement on a river in Missouri and held that the upper Meramec was subject to such an easement and that:

" . . . the waters of the Meramec River are public waters and the submerged area of its channel over and across appellant's farm is a public highway for travel and passage by floating and by wading, for business or for pleasure, and that in traveling the course of the stream by canoe or wading, respondent was not a trespasser on the property of appellant. . . ." Id. at 26.

The tests stated in Elder require factual determination as to whether a river is "navigable" or subject to a public easement. Each case involving a river must be decided with reference to its own facts. Elder v. Delcour, supra, 1.c. 21-22.

Although you have stated certain facts in your opinion request, all facts and historical information upon which the cases depend are not included. Furthermore, in these cases the courts have taken judicial notice of certain facts based upon observation. Because of dependence upon facts and information concerning each river this office is not in a position to make a determination as to whether the Little St. Francis River falls within the guidelines of Elder v. Delcour, supra.

We suggest that the prosecuting attorney is in the first instance in the best position to make such determination. To assist you in making such a judgment it would be helpful for you to compare the portion of the Little St. Francis in question with other rivers on which court decisions have been made.

The courts in Missouri have ruled on the following rivers as to "navigability" for determination of title to the bed:

Meramec River - Crawford County - non-navigable,
Slovensky v. O'Reilly, Mo., 233 S.W. 478 (1921);

Current River - near Doniphan - non-navigable, T. L.
Wright Lumber Co. v. Ripley County, Mo., 192 S.W. 966 (1917);

Black River - Butler County - Poplar Bluff - non-navigable north of Cat bridge, Grobe v. Energy Coal & Supply Co., Mo.App. 275 S.W. 67;

Honorable John W. Reid, II

Stout's Creek - Iron County - non-navigable, Greisinger v. Klinhart, Mo.App., 282 S.W. 473, judgment and record quashed State ex rel. Greisinger v. Cox, Mo., 292 S.W. 75;

Mississippi River - navigable - Hickey v. Hazard, 3 Mo. App. 480;

Missouri River - navigable - Benson v. Morrow, 61 Mo. 345; Cooley v. Golden, Mo. 23 S.W. 100 (1893); Peterson v. City of St. Joseph, 156 S.W.2d 691 (1942);

Platte River - non-navigable - Cambest v. McComas Hydro-electric Co., Mo.App. 245 S.W. 598 (1922) (used federal test).

Gasconade River - Pulaski County - non-navigable - Hobart-Lee Tie Co. v. Grabner, Mo.App., 219 S.W. 975 (1920);

Meramec River - St. Louis County - court held not non-navigable - Tonkins v. Monarch Bldg. Materials Corp., Mo. 347 S.W.2d 152;

Chariton River - non-navigable - State ex rel. Applegate v. Taylor, Mo. 123 S.W. 892.

The courts in Missouri have ruled on the following rivers and held they are subject to a public easement:

Meramec River - Dent County - Elder v. Delcour, supra;

Indian Creek - McKinney v. Northcutt, Mo.App. 89 S.W. 351;

Current River - State v. Wright, Mo.App., 208 S.W. 149;

Blue River - Bollinger v. American Asphalt Corp., Mo.App., 19 S.W.2d 544;

Gasconade River - Pulaski County - Hobart-Lee Tie Co. v. Grabner, Mo.App., 219 S.W. 975;

James River - City of Springfield v. Mecum, Mo.App., 320 S.W.2d 742.

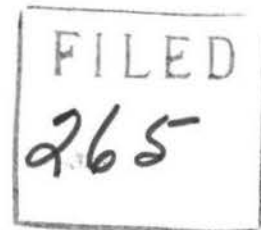
Very truly yours,

JOHN C. DANFORTH
Attorney General

October 12, 1971

OPINION LETTER NO. 265
Answer by Letter - Park

Honorable Dee Wampler
Prosecuting Attorney
Greene County, Court House
Springfield, Missouri 65802



Dear Mr. Wampler:

This opinion is rendered pursuant to the request contained in your letter concerning the transfer of title to automobiles when registration is in the names of several persons.

The facts as related in your letter are as follows:

"It has come to my attention that the Department of Revenue, by virtue of Memorandum 14-70, dated May 12, 1970, holds that even though two individuals may be listed on a car title, the Department of Revenue will accept title if it contains only one signature of the two individuals involved."

The question presented is ". . .whether or not such transfers signed by one of several parties on a car title are legal and valid."

Section 301.210, RSMo 1969, relating to sale and transfer of vehicles, in pertinent part, reads as follows:

"1. In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a

Honorable Dee Wampler

statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer."

Section 301.190, RSMo 1969 states:

"1. No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the director of revenue unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, . . .

"2. The director of revenue shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. . . .

* * *

"4. It is unlawful for any person to operate in this state a motor vehicle or trailer required to be registered under the provisions of the law unless a certificate of ownership has been issued as herein provided."

Considering the language used in the statutes quoted above, it is clear that the words "the holder of such certificate" mean the owner of the motor vehicle or trailer. In cases where a vehicle is owned by more than one person, either jointly, as tenants in common or as tenants by the entirety, all of these people, collectively, are the owner of the vehicle. With respect to joint tenants, the court in *Horton v. Estate of Elmore*, 420 S.W.2d 48, 49 (K.C.Ct.App. 1967) the court said:

"One aspect of joint tenancy is that both parties presently have ownership interest in the property held; each one has present interest in the property, it is not one or the other, it is both."

Honorable Dee Wampler

Likewise, where property is held by tenancy in common, all of the tenants are considered to be owners of the property, not merely one of them, and in such cases, a tenant in common may not transfer, sell or dispose of more than his own interest in the common property to a third person unless he is specially authorized to do so. 86 C.J.S., Tenancy in Common, §119(a). In the case of Timothy v. Hicks, 237 Mo.App. 126, 164 S.W.2d 99 (1942) the court stated:

"Cotenants do not sustain the relation of 'principal and agent' to each other nor are they 'partners', and hence, under ordinary circumstances, neither tenant in common can, in dealing with third parties, bind the estate or person of the other by any act which relates to the common property not previously authorized or subsequently ratified."

Where several persons own a motor vehicle and have a certificate of ownership issued by the Department of Revenue in the several names, these persons collectively are considered to be owners of the vehicle. Inasmuch as the statute requires the owner to endorse a certificate of ownership in order to effect its assignment, it is our view that all such owners named in the certificate of ownership must endorse the same unless there is specific authorization to the contrary given by one owner to another.

It is therefore our opinion that in the absence of specific authority given by one or more of several owners of a motor vehicle to the other, the law does not authorize the transfer of certificates of ownership of motor vehicles by endorsement of less than all of the persons named as owners in such certificates.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:

The board of education of a six-director school district cannot make the contract between the school district and a permanent teacher, who has reached age 65, subject to a time limitation of one year.

OPINION NO. 268

October 6, 1971

Honorable Lloyd J. Baker
Representative
Ninety-Seventh District
R.F.D. 3, Box 150
Moberly, Missouri 65270



Dear Representative Baker:

This official opinion is issued in response to your request for a ruling on whether the school board of a six-director school district can require a tenure teacher to sign a one-year contract after the teacher reaches 65 years of age. From facts furnished to us with your opinion request, we understand that the school board of a six-director school district does not have a regulation requiring teachers to retire before they reach 70 years of age. However, on March 4, 1970, the Board of Education of this district passed a motion stating that teachers who are 65 years of age or older will be employed on a one-year basis only. You advise that the teacher in question has been employed by the school district for six years prior to the 1970-1971 school year. On September 8, 1970, this teacher was 65 years old. In March of 1971, the Board of Education of the school district tendered to this teacher a nine-month contract commencing August 25, 1971.

The foregoing facts will be used as the basis for this opinion. We understand your question to be whether the board of education of a six-director school district can require a permanent teacher between the ages of 65 and 70 to enter into a one-year contract.

Section 169.060, RSMo 1969, provides that all teachers in the State of Missouri must retire at age 70. However, teachers with five years or more creditable service may retire with full benefits after age 60.

The definition of a "permanent teacher" for purposes of the Teacher Tenure Act, Sections 168.102 to 168.130, RSMo 1969, is found in Section 168.104(4). Under this definition, a teacher must be employed for six successive years as a full-time teacher by the same school district before she achieves permanent teacher status. See Opinion No. 371, October 2, 1970, to Honorable James P. Mulvaney (copy enclosed). Under the assumed facts forming the basis for this opinion, the teacher in

Honorable Lloyd J. Baker

question has served six successive years in the same school district and is, therefore, a permanent teacher.

Any contract entered into between a permanent teacher and a school district is an indefinite contract. See Sections 168.104(3) and 168.106, RSMo 1969. There is no authority in the Teacher Tenure Act for a board of education to enter into a contract with a permanent teacher which is not an indefinite contract. See Section 168.106, RSMo 1969.

Section 168.106 provides as follows:

"Indefinite contract, what affects. --
The contract between a school district and a permanent teacher shall be known as an indefinite contract and shall continue in effect for an indefinite period, subject only to:

"(1) Compulsory or optional retirement when the teacher reaches the age of retirement provided by law, or regulation established by the local board of education;

"(2) Modification by a succeeding indefinite contract or contracts in the manner hereinafter provided;

"(3) The death of the teacher;

"(4) Resignation of the teacher with the written consent of the school board;

"(5) Termination by the board of education after a hearing as hereinafter provided; and

"(6) The revocation of the teacher's certificate." (Emphasis supplied.)

Under this section, a permanent teacher's contract continues indefinitely except for the enumerated exceptions. That the legislature intended this list of exceptions to be exclusive is apparent from the phrase "subject only to". None of the listed exceptions authorizes a board of education to convert a permanent teacher's indefinite contract into a yearly contract.

CONCLUSION

Therefore, it is the opinion of this office that the board of education of a six-director school district cannot make the

Honorable Lloyd J. Baker

contract between the school district and a permanent teacher,
who has reached age 65, subject to a time limitation of one year.

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned below the phrase "Very truly yours,".

JOHN C. DANFORTH

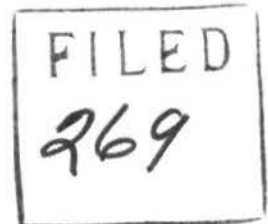
SCHOOLS:
TEACHERS:

A teacher who served eleven years in a school district from 1954 through 1965, before leaving the employment of that district, and who returned to the district four years later in 1969, and who was reemployed for two successive years after returning, qualified as a permanent teacher prior to leaving the employment of the district and, therefore reemployment for the first school year did not constitute an indefinite contract but when the teacher was employed for the succeeding year, the employment constituted an indefinite contract, pursuant to Section 168.104(4), RSMo 1969.

OPINION NO. 269

May 13, 1971

Honorable Eric F. Fink
Representative, District 46
Room 202B, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Fink:

This official opinion is issued in response to your request for a ruling on the following questions:

"A teacher taught in a school district from 1954 through 1965 and from 1969 through the present date.

"According to section 168.104(4) 'Permanent teacher,' since the teacher referred to has completed five years of service in the same district that re-employed her, should she not receive tenure after being re-employed for a second successive year?

"Further, according to section 168.104(5), since she has been previously employed as a full time teacher two or more years, should not the board of education at least waive one year of her probationary period?

"Since she has taught in the same district eleven years before a leave of absence and twelve years before the tenure bill went into effect, it would seem unduly restrictive to interpret the law to mean that her teaching experience would have to be outside that same district."

Honorable Eric F. Fink

Your inquiry relates to a teacher who has taught in a school district for eleven years, takes a leave of absence for approximately four years and is rehired by the same school district for the 1969-1970 and 1970-1971 school years. We understand your question to be whether this teacher would be a "permanent teacher" as that term is defined in Section 168.104(4). If she is not a permanent teacher, you then inquire whether the board should waive one year of her probationary period pursuant to Section 168.104(5).

Section 168.104(4) provides as follows:

"'Permanent teacher', any teacher who has been employed or who is hereafter employed as a teacher in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district; except that, when a permanent teacher resigns or is permanently separated from employment by a school district, and is afterwards reemployed by the same school district, reemployment for the first school year does not constitute an indefinite contract but if he is employed for the succeeding year, the employment constitutes an indefinite contract. Any permanent teacher who is promoted with his consent to a position of principal or assistant principal, or is first employed by a district as a principal or assistant principal, shall not have permanent status in such position but shall retain tenure in the position previously held within the district, or, after serving two years as principal or assistant principal, shall have tenure as a permanent teacher of that system;"

The crucial part of this definition for the purpose of answering your inquiry, is the following:

". . . except that, when a permanent teacher resigns or is permanently separated from employment by a school district, and is afterwards reemployed by the same school district, reemployment for the first school year does not constitute an indefinite contract but if he is employed for the succeeding year, the employment constitutes an indefinite contract. . . ."
(Emphasis supplied)

To be accorded "permanent teacher" status upon returning to a school system for two years, a teacher must have been a "permanent teacher" at the time he separated from the school system.

Honorable Eric F. Fink

In Opinion No. 371, dated October 2, 1970, we had occasion to interpret Section 168.104(4) in the following manner:

"Pursuant to Section 168.104(4), RSMo 1969, a permanent teacher is a teacher who has taught in the same school district for five successive years and has been reemployed by that district for the sixth successive year. The critical point in time for achieving permanent teacher status is reemployment for the sixth successive year by the same school district. A teacher may have been employed for the sixth successive year either before or after the effective date of the Teacher Tenure Act (July 1, 1970) and thereby be a 'permanent teacher' for the purposes of the 'except' clause of Section 168.104(4). However, if such a permanent teacher has separated from the district either before or after the effective date of the Teacher Tenure Act, he does not achieve permanent teacher status immediately upon reemployment with the district. The teacher must serve one probationary year and, if reemployed for the succeeding year, regains permanent teacher status in that district."

Based on these conclusions from Opinion No. 371, which we hereby reaffirm, the teacher in question would have been a permanent teacher at the time she left the employment of the school district in 1965, having served eleven years continuously in the district. Upon reemployment by the same school district for the second successive year after her return, i.e., the 1970-1971 school year, this teacher's employment would constitute an indefinite contract pursuant to Section 168.104(4).

Having determined that the teacher in question would have permanent teacher status upon reemployment for the second successive year, we do not reach the second question concerning the length of time she would have to serve as a probationary teacher under Section 168.104(5).

CONCLUSION

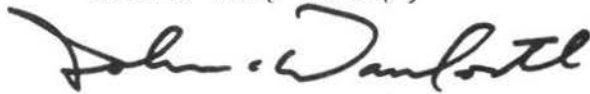
Therefore, it is the opinion of this office that a teacher who served eleven years in a school district from 1954 through 1965, before leaving the employment of that district, and who returned to the district four years later in 1969, and who was reemployed for two successive years after returning, qualified as a permanent teacher

Honorable Eric F. Fink

prior to leaving the employment of the district and, therefore re-employment for the first school year did not constitute an indefinite contract but when the teacher was employed for the succeeding year, the employment constituted an indefinite contract, pursuant to Section 168.104(4), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 371
10-2-70, Mulvaney

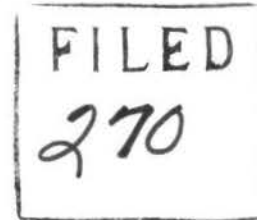
COOPERATIVE AGREEMENTS:
WATER SUPPLY DISTRICTS:
CITIES, TOWNS AND VILLAGES:

A public water supply district organized under the provisions of Sections 247.010 to 247.220, RSMo 1969, and a city having a waterworks system are authorized under Section 16 of Article VI of the Missouri Constitution and Sections 70.210, RSMo 1969 et seq. to enter into a cooperative agreement for the joint development and financing of a common water supply source.

May 19, 1971

OPINION NO. 270

Honorable Robert H. Martin
Representative, District 19
State Capitol - Room 401B
Jefferson City, Missouri 65101



Dear Representative Martin:

This opinion is in response to your question in which you ask:

"Can a public water supply district organized under Chapter 247, R.S.Mo., enter into a cooperative agreement with a city under Chapter 70.220 etc., R.S.Mo., for the joint development and financing of a common water supply source?"

Section 70.210, RSMo 1969, states:

"Definitions - As used in sections 70.210 to 70.320, the following terms mean:

- "(1) 'Governing body', the board, body or persons in which the powers of a municipality or political subdivision are vested;
- "(2) 'Political subdivision', counties, townships, cities, towns, villages, school, county library, city library, city-county library, road, drainage, sewer, levee and fire districts, soil and water conservation districts, watershed subdistricts, and any board of control of an art museum."

Section 70.220, RSMo 1969, states:

Honorable Robert H. Martin

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Public water supply districts organized under Sections 247.010 to 247.220, RSMo 1969, known as "county districts", are, under Section 247.020 expressly designated as "political corporations".

Under Section 247.050, RSMo 1969, such districts have, among other powers, the powers:

- "(5) To build, acquire by purchase or otherwise, enlarge, improve, extend and maintain a system of waterworks, including fire hydrants;
- "(6) To contract and be contracted with; . . .
- "(10) To acquire by purchase or otherwise, a system of waterworks, and to build, enlarge, improve, extend and equip such system for the uses and purposes of the district;"

We have noted that under the definition section, Section 70.210, a "political subdivision" expressly includes certain units of government. That section does not expressly mention public water supply districts.

However, Section 70.220, which we have also quoted above authorizes cooperation by municipalities as well as political subdivisions as defined.

Honorable Robert H. Martin

The cooperative agreement sections noted above are in implementation of the provisions of the Missouri Constitution Section 16, Article VI which states:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

The Supreme Court of Missouri has held that Section 70.220 follows the language of the constitutional provision but further spells out the requirement implicit in the Constitution that the subject and purposes of the cooperative contract or action shall be within the scope of the powers of the municipality or political subdivision. This constitutional provision is a specific grant or recognition of authority. School District of Kansas City v. Kansas City, 382 SW2d 688 (En banc 1964).

It is clear of course that a city is both a municipality and a "political subdivision" as defined in Section 70.210. In our view although such a water supply district is not expressly defined as a political subdivision in that section, it is nevertheless a municipality. In St. Louis Housing Authority v. City of St. Louis, 239 SW2d 289 (En banc 1951), the Supreme Court of Missouri held that the City of St. Louis and the St. Louis Housing Authority are "municipalities" as such term is used in Section 16 of Article VI of the Constitution. In reaching this conclusion, the court noted that the terms "municipality" and "municipal corporation" are often interchangeably used. The Court further held that a "municipal corporation" in the broader sense includes a public corporation created to perform an essential public service and is applied to any public local corporation exercising some function of government. Id., 295. Further in State ex rel Halferty v. Kansas City Power & Light Co., 145 SW2d 116, 122 (1940), the Missouri Supreme Court noted that a water supply district is denominated as a "political corporation" by the act under which it was organized and that it "might be termed a 'municipal corporation' in the broad sense, sometimes attributed to that term". The precise question decided in that case however, was whether such a water supply district is a "municipal township" as that term is used in certain tax statutes and the court held a water supply district is not a municipal township.

In the premises, it is our view that such a water supply district is a "municipality" within Section 16 of Article VI of the Missouri Constitution and the implementing statutes

Honorable Robert H. Martin

Sections 70.210 et seq. As noted above from our quotations relative to the powers of such water supply districts, the subject and purposes of the contract or cooperative action inquired about in the opinion request would be within the scope of the powers of such a district since in this instance the cooperative agreement is for the purpose of the joint development and financing of a common water supply source.

It is clear that cities can enter into contracts under Sections 70.210 et seq. and under Section 91.010, RSMo 1969, cities, towns, and villages in this state "have the power to erect, maintain and operate waterworks, or to acquire waterworks by purchase and to operate and maintain the same, and to supply the inhabitants thereof with water".

Although we do not have the details of the contract under consideration or the identity of the public water supply district or the particular city involved, it is our view that a public water supply district organized under the provisions of Sections 247.010 to 247.220, RSMo, is authorized to enter into a cooperative agreement with a city which has a waterworks system, for the joint development and financing of a common water supply source.

CONCLUSION

It is the opinion of this office that a public water supply district organized under the provisions of Sections 247.010 to 247.220, RSMo 1969, and a city having a waterworks system are authorized under Section 16 of Article VI of the Missouri Constitution and Sections 70.210, RSMo 1969 et seq. to enter into a cooperative agreement for the joint development and financing of a common water supply source.

The foregoing opinion which I hereby approve was prepared by my assistant John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SIGNATURES:
COUNTY WARRANTS:

A county warrant may be executed by a county judge by the use of the facsimile signature of the county judge who is required to sign the warrant provided the manual signature of said judge has been properly filed with the Secretary of State.

OPINION NO. 273

June 7, 1971

Honorable Arlie H. Meyer
Representative, District 105
Room 235, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Meyer:

This is in response to your request for an opinion as follows:

"I would appreciate a legal opinion from your office on the following question:

"Under the Uniform Facsimile Signature of Public Officials Law sections 105.273 to 105.278 may the three officials who sign county warrants use a facsimile signature?"

Subsequent to your opinion request, you have informed us the request concerns the authority for the use of a facsimile signature for a county court judge who is required to sign a warrant.

The use of facsimile signatures for public officers is found in Section 105.273 to and including Section 105.278, RSMo 1969.

Section 105.273, RSMo, provides:

"As used in sections 105.273 to 105.278

"(1) 'Public security' means a bond, note, certificate of indebtedness, or other obligation for the payment of money, issued by this state or by any of its departments, agencies or other instrumentalities or by any of its political subdivisions;

"(2) 'Instrument of payment' means a check, draft, warrant or order for the payment, delivery or transfer of funds;

Honorable Arlie H. Meyer

"(3) 'Authorized officer' means any official of this state or any of its departments, agencies, or other instrumentalities or any of its political subdivisions whose signature to a public security or instrument of payment is required or permitted;

"(4) 'Facsimile signature' means a reproduction by engraving, imprinting, stamping, or other means of the manual signature of an authorized officer."

Section 105.274, RSMo, provides:

"Any authorized officer, after filing with the secretary of state his manual signature certified by him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature:

"(1) Any public security, provided that at least one signature required or permitted to be placed thereon shall be manually subscribed; and

"(2) Any instrument of payment.

"Upon compliance with sections 105.273 to 105.278 by the authorized officer, his facsimile signature has the same legal effect as his manual signature."

Under the above statutes, the facsimile signature of any officer who is required by law to sign an "instrument of payment" may be used in lieu of the officer's manual signature in executing any "instrument of payment" provided his manual signature has been filed with the Secretary of State.

Counties are political subdivisions of the state. Barton County v. Walser, 47 Mo. 189; Chaffin v. County of Christian, 359 S.W.2d 730; Miller v. Ste. Genevieve County, 358 S.W.2d 28. A county officer is an officer of a political subdivision of this state, and a warrant for the payment of money by the county is an "instrument for payment" under the above statute, and any official whose signature is required by law may execute or cause to be executed his facsimile signature in lieu of his manual signature.

In regard to the duties of the county court and to the county clerk in issuing warrants, Section 50.180, RSMo 1969, provides:

Honorable Arlie H. Meyer

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:

Treasurer of the county of _____: Pay to _____ dollars, out of any money in the treasury appropriated for ordinary county expenditures (or express the particular fund, as the case may require).

Given at the courthouse, this _____ day of _____, 19 _____, by order of the county court.

Attest: C D, clerk.

A B, president."

Section 50.190, RSMo 1969, provides in part:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year; . . ."

Under the above statutes, when the county court ascertains any sum of money is due from the county, it directs the county clerk to issue a warrant for the amount due, which warrant is required to be signed by the president of the county court while the said court is in session, and the same shall be attested by the county clerk. It is our opinion that a county judge who is required to sign a county warrant for the payment of money may use or cause to be used his facsimile signature to such warrant.

CONCLUSION

It is the opinion of this office that a county warrant may be executed by a county judge by the use of the facsimile signature of the county judge who is required to sign the warrant provided the manual signature of said judge has been properly filed with the Secretary of State.

Honorable Arlie H. Meyer

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large, sweeping initial "J" and a long, horizontal stroke extending to the right.

JOHN C. DANFORTH
Attorney General

May 4, 1971

Answer by Letter - Klaffenbach
OPINION LETTER NO. 274

Honorable Arlie H. Meyer
Missouri House of Representatives
234 Thomas
St. Charles, Missouri



Dear Representative Meyer:

This letter is in answer to your request for an opinion in which you ask:

"If money is loaned from the General Fund to the Road and Bridge Fund, do the statutes prohibit paying back this loan plus a reasonable amount of interest to the General Fund."

While we do not pass upon the legality of such a "loan," we enclose for your information Opinion Letter No. 423, dated October 19, 1970 to the Honorable Hugh A. Sprague, which holds that a county court under certain circumstances does have the authority to rectify an erroneous transfer by transferring funds from the road and bridge fund to the general fund for expenditure during the current budget year.

With respect to the power of a county court, the Supreme Court of Missouri held in King v. Maries County, 249 SW 418, 420:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute.***This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted."

Honorable Arlie H. Meyer

We find no authority for the payment of interest from the road and bridge fund in this situation and, therefore, are of the view that, since such funds can be used only for certain purposes, (Missouri Constitution Article X, Section 12(a) and Sections 137.554 RSMo 1969 et seq.,) the payment of interest in such a case is prohibited.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

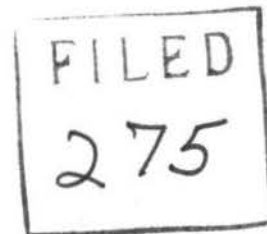
Opinion Letter No. 423, 10/19/70, Sprague

June 14, 1971

Answer by letter-Wood

OPINION LETTER NO. 275

Honorable James A. Noland, Jr.
Senator, District 33
Room 428A, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Noland:

You have requested my opinion on the following question:

"A Nursing Home District, situated in my Senatorial District, held an election to issue bonds in the amount of \$388,000.00.

"The election was held in good faith and the bonding company handling the matter thought this was the statutory limit. The measure passed, after which it was determined that 5% of the total assessed valuation in the district amounted to \$374,000.00.

"\$374,000.00 would be sufficient to achieve the purposes of the Nursing Home District in its efforts to construct a new facility. However, the bonding company is concerned with the validity of the election.

"My specific question is: Is the election valid for a lesser amount than that authorized when the election was held?"

Section 198.310, RSMo 1969, authorizes nursing home districts to borrow money for stated purposes and to issue bonds for the payment thereof. The question of the indebtedness must be submitted at a special election and be approved by a two-thirds vote. Although the statute authorizes the creation of indebtedness in this

Honorable James A. Noland, Jr.

manner in an amount that does not exceed ten percent of the value of the last assessed valuation of taxable tangible property in the district, we have expressed the view in an earlier opinion (No. 33, January 30, 1964, Woolsey, copy enclosed) that because of Article VI, Section 26(a), Constitution of Missouri, 1945, this amount may not exceed five percent of assessed valuation.

In regard to the special election, the statute requires that there be notice of the election which includes the "amount and purpose of the loan" and that the election ballot ". . . shall be in substantially the following form:

(Amount and purpose of loan)

For the loan

Against the loan . . ."

(Section 198.310, RSMo)

". . . Of course, 'elections should be so held as to afford a free and fair expression of the popular will and mandatory statutory requirements must be followed', State at inf. McKittrick ex rel. Martin v. Stoner, 347 Mo. 242, 146 S.W.2d 891, 894(8); but, '"elections are not lightly set aside" and there is a vast difference in passing on the rules and regulations regarding the conduct of an election before the election is held and after.' Armantrout v. Bohon, 349 Mo. 667, 162 S.W.2d 867, 871 (8-10). 'As a general rule (in the absence of fraud), an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed.' Bernhardt v. Long, 357 Mo. 427, 209 S.W.2d 112, 116(7); Armantrout v. Bohon, supra, 162 S.W.2d loc. cit. 871." (State ex rel. Brown v. Cape, 266 S.W.2d 45, 46 (Spr.Ct.App. 1954))

The infirmity in the election inquired about in the opinion request was the erroneous statement in the ballots of the amount of the proposed indebtedness. This was assuredly a violation of the statute requiring the ballots to contain a statement of the amount of the proposed indebtedness (Section 198.310, RSMo).

". . . The well-established rule, here applicable, is that an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by the statute on

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the subject or unless the irregularity is such as 'probably prevented a free and full expression of the popular will.' . . ." (State ex rel. Thompson v. Arnold, 213 S.W. 834, 837 (Mo. banc 1919))

In State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 87 S.W.2d 147 (Mo. banc 1935), general obligation bonds of the sewer district were held valid against the objection that in the submission of the proposition for the authorization of the bond issue, the amount of the proposed bonds was not definitely stated. The statute there involved required,

"' . . . submitting at such election a proposition to incur indebtedness by the District in an amount not greater than the estimate of the cost of constructing a system of sewers as provided in the report of the engineers.' . . ."

The challenged ballots submitted the proposition,

"' . . . to incur an indebtedness of said District, of an amount not greater than Eight Hundred Thousand (\$800,000) for the purpose of constructing a system of sanitary trunk line sewers for said District; . . .'"

In sustaining the election, the Supreme Court commented:

"Respondent argues that the use of the words 'an amount not greater than \$800,000' leaves to the board of trustees the opportunity to build a sewer system much less extensive than could be built with \$800,000, which might not meet the needs of the district and be unacceptable to the voters. We are not impressed with the force of this argument. . . . The system described in the engineer's report was the only system of sewers the district had or could have had in prospect. It would be an unreasonable presumption to assume that any voter did not understand that he or she was voting for or against an indebtedness to construct the proposed sewer system. The amount of indebtedness to be incurred was therefore limited to the maximum amount of \$800,000 (the engineer's estimate) and a minimum equal to the best contract price which could be obtained for the construction of the improvement specified in the engineer's report, and was stated

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with sufficient definiteness in the submission to the voters." (87 S.W.2d at 155)

It is true that the above case and the present situation may differ in that the sewer district statute required, and there was in existence at the time of the election, a definite engineer's plan for the proposed construction, whereas plans and designs for the proposed nursing home might not have existed at the time of the questioned election. However, since the nursing home district now proposes to issue bonds in the amount of \$374,000.00, and to use the proceeds to construct a nursing home, we doubt that the voters have been misled or deceived although they authorized the slightly greater amount of \$388,000.00 for the same purpose.

State ex rel. Kansas City v. Smith, 259 S.W. 1060 (Mo. banc 1924) ruled that Kansas City's voter approved waterworks improvement bonds were valid although separate litigation (State ex inf. Barrett ex rel. Callghan v. Maitland, 246 S.W. 267 (Mo. banc 1922)) had determined subsequent to the election on the bonds that certain city charter amendments under which the election was held were invalid. The existing city charter was held to provide sufficient authority for the election. The invalid charter amendments among other things permitted interest not to exceed six percent and the ordinance calling the bond election so provided. The existing charter only permitted five percent interest on such bonds. One of the points raised in the Smith case was that the city council could not thereafter sell waterworks bonds at four and one-half percent interest when the voters had in effect approved bonds bearing six percent interest. The Supreme Court of Missouri relied on a North Carolina decision upholding bonds in these circumstances and quoted the North Carolina court as follows:

"The people having voted for the issue of bonds at a rate not exceeding 6 per cent., it was equivalent to a vote for bonds at any less rate, as the greater includes the less." (259 S.W. at 1064)

Our Supreme Court also referred to an Illinois decision of identical holding and summarized therefrom the "... rule that surplusage does not vitiate that which in other respects is valid, and that surplusage is innocuous and must be disregarded." (259 S.W. at 1064).

In our opinion, authorization by the electorate for a greater principal indebtedness includes their authorization for a lesser principal indebtedness, and, to the extent that the voted indebtedness exceeds that authorized by law, it is harmless surplusage.

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" . . . where an irregularity is not declared by statute to be fatal, the courts will be slow to so construe it as to disfranchise voters because of the errors of [election] officials. . . ." (State ex inf. Barrett v. Imhoff, 238 S.W. 122, 126 (Mo. banc 1922))

We cannot find a Missouri decision directly answering your question. However, decisions from other jurisdictions indicate that a majority would answer it in the affirmative.

"The fact that the limit of the amount of bonds which may be issued is fixed at a specified figure does not prevent the issuance of bonds in a lesser amount [Ky., Kan]. Where the total amount of bonds issued comes within the constitutional limits, it is immaterial that accomplishment of the purpose for which the bonds were voted would cost more than the amount of the bond issue [Ky., Fla.]. The mere fact that an order for an election or a vote of the electors [Tex.] calls for an issue of bonds beyond the constitutional or statutory limits does not prevent the issuance of bonds in an amount within the limitation. Bonds issued in excess of the constitutional or statutory limitations are void [Okla.]. According to some decisions, where the issue of bonds is partly within and partly beyond the limit, it may be sustained up to the legal limit [Ky.], but it has also been held that, prior to the issuance and sale of an issue of bonds in excess of the limitations, it will be held bad in its entirety [Okla.]." (79 C.J.S., Schools and School Districts, §361, p. 79)

A collection of digested cases from other jurisdictions appearing at 175 American Law Reports pages 848-867 reflects that the courts of eleven states (Ark., Colo., Ill., Kan., Ky., La., Mich., N.Y., Ohio, S.C., and Tex.) are of the view that bonds authorized by the voters in excess of legal limitations may nevertheless be issued within the limitations, whereas the courts of eight states (Ga., Mont., Neb., Okla., Ore., Wash., W.Va., and Wis.) have taken the contrary view.

Thornburgh v. School Dist. No. 3, 75 S.W. 81 (Mo. 1903), discussed in our earlier Opinion No. 33 of 1964, supra, ruled that a holder of bonds issued in excess of the district's constitutional

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limit could not bring a suit at law upon the bonds. The court declined a request to allow judgment for that amount of the bonds which was within the constitutional limit.

" . . . That course would be equivalent to the making of a new contract for the parties--not only a contract which the parties themselves did not make, but one which we have no means of knowing they would have made. The voters of the district, who were to be first consulted, might be very willing to build a new schoolhouse of a style to cost \$3,500, but unwilling to build one of a style to cost only \$1,900. . . . The school directors essayed to make a contract that they were expressly forbidden by the Constitution to make, and it is therefore wholly invalid. The argument is made that the school district got the money for these bonds, and used it in the construction of a schoolhouse, which it has ever since used, and still possesses and enjoys. If this were a suit in equity to subject the property to the payment of the money furnished to purchase it, that argument would be in place; but this is an action at law, and the plaintiff must stand or fall on the question of the validity of the contract." (75 S.W. at 86)

We do not understand the Thornburgh case to rule any further than that when bonds are sold in excess of the constitutional limitation all of the bonds whether within or in excess of the constitutional limitation are void, not that bonds authorized in excess of the limitation are necessarily void in their entirety.

On the other hand, in Catron v. LaFayette County, 17 S.W. 577 (Mo. 1891), the county court had issued a series of bonds for jailhouse construction during the period December, 1866 to May, 1867. The last five bonds were issued in May, 1867 and caused the entire series to aggregate \$10,508.01, whereas the statute only authorized the county to become indebted in the amount of \$10,000.00 for purposes of building a jailhouse. The Supreme Court upheld recovery by the purchaser of five of these jailhouse bonds, which bonds had been issued in January, 1867.

" . . . But if, at the time they were issued and purchased, it was within the power of the court to issue them, no subsequent improper issue of bonds could impair his rights under the bonds thus legally issued and purchased by

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him. The fact that the county court after he had paid his money for these bonds, and his rights under them had become fixed, issued other bonds for the same purpose, until finally they exceeded in the last issue, by a small sum, the aggregate amount which they were authorized to issue for such purpose, could in no way affect the integrity of these bonds of plaintiff issued strictly within the limits of their power. The issue for the excess only would be void. The bonds issued and delivered before the limit of the power was reached are valid, and plaintiff's were of this number. . . ." (Catron v. LaFayette County, 17 S.W. at 579)

State ex rel. City of Dexter v. Gordon, 158 S.W. 683 (Mo. banc 1913) ruled that the "last assessment" within the meaning of the constitutional provision authorizing local government indebtedness (Article X, Section 12, Constitution of Missouri, 1875) had reference to the date of the election on the question, not the date the bonds were issued. The court refused to order the state auditor to register bonds in an amount exceeding the per centum of the assessment completed as of the date of the election.

"The action of the board not being in compliance with the Constitution, and the proposed indebtedness being in excess of the prescribed limit, the bonds are void. . . ." (158 S.W. at 685)

Steinbrenner v. City of St. Joseph, 226 S.W. 890 (Mo. banc 1920) applied the same rule in approving the enjoining of a proposed municipal bond issue that exceeded the per centum of the last completed assessment at the time of the election. State ex rel. Consolidated Dist. C-4 of Caldwell County v. Holmes, 245 S.W.2d 882 (Mo. banc 1952) ruled that a change in the language of the constitutional provision for local government indebtedness in the 1945 Constitution (Article VI, Section 26(b)) did not alter the rule expressed in State ex rel. City of Dexter v. Gordon, so that the state auditor would not be compelled to register a proposed issue of school district bonds that exceeded the per centum of the assessed valuation completed at the time of the election authorizing the indebtedness. We do not believe these cases consider, or rule the question of the registrability or validity of a bond issue in an amount less than that authorized by the electorate but within that permitted by the constitutional debt limitation.

In Missouri Power & Light Co. v. City of Pattonsburg, 125 S.W.2d 20 (Mo. 1939), the utility sought to enjoin the city's construction

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and operation of its own electric light plant. An election had been held in the city authorizing the issuance of \$50,000.00 in bonds for this purpose. The utility contended that at the time of the election the city's plan was to obtain the \$50,000.00 loan from the federal government and that after the election the federal authorities rejected the city's application, which resulted in the city's construction of a light plant of smaller capacity than originally intended. The utility contended that in these circumstances the new plan should have been submitted to the voters. The Supreme Court observed that the people of the city had authorized the indebtedness for construction of a light plant, that the expediency of doing so was for the people and the city officials to decide, and that there was no allegation that any fraud had been practiced on the voters or that they had been misinformed as to the true facts. The Supreme Court held that there was no reason for a court of equity to enjoin the collection of taxes to retire the bonds (125 S.W.2d at 22)

"Bonds may be issued in a lesser amount than that authorized by the election [Ark., Ky.] and at a lower rate of interest than that authorized [Tex.]. Where the electors have approved an issue of bonds in an amount in excess of that permitted by law, such approval affords sufficient authority for the issuance of bonds in an amount within the statutory limits in the absence of a showing that the latter amount would not have been voted [Colo.], so that a partial issue of such bonds in an amount within the limitation is valid [Kan.]; . . ."
(79 C.J.S., Schools and School Districts, §366, p. 106)

We think it can be seen that the resolution of your question by a court of this state would not be an easy task. We cannot, of course, predict with accuracy how the question would be thus resolved. Language of some of the earlier decisions of the Missouri Supreme Court, herein noted, would suggest that since the authorization for the indebtedness exceeded the constitutional limitation, no indebtedness has been authorized. However, as we have noted, the modern majority view appears to be that the excessive authorization is sufficient to authorize the incurring of an indebtedness within the constitutional limitation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

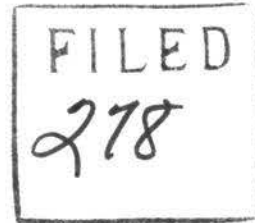
Enclosure: Op. No. 33
1-30-64, Woolsey

May 6, 1971

OPINION LETTER NO. 278

Answer by Letter - Klaffenbach

Honorable Joe A. Johnson
Prosecuting Attorney
Jefferson County
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Johnson:

This letter is in response to your request for an opinion in which you ask:

- "1. Whether or not the County Court has authority to dismiss members of the Building Commission prior to the end of the two year term for which they were commissioned.
- "2. Whether the County Court has the authority to amend or delete portions of the Building Code adopted pursuant to the provisions of Section 64.180, without the necessity of public hearing and notice, as required for the initial adoption of the Building Code."

In answer to your first question we note that under the provisions of Section 64.180, RSMo 1969 the members of said commission serve for a term of two years. There is no express statutory grant of a power of removal by the county court.

In State vs. Police Commissioners, 14 Mo. App. 297 (1883), at 1.c. 302, the St. Louis Court of Appeals stated:

"It is not disputed that the power of removal at pleasure is incidental to the power of appointing, in the absence of any inconsistent limitation in the law which creates the authority to appoint. If the law provides a term for

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the incumbency, this will supersede the incidental power of removal during the continuance of the term." (Affirmed 88 Mo. 144)

The above holding was approved by the Supreme Court of Missouri in State vs. Maroney, 191 Mo.531, 90 S.W. 141, 147 (1905). The Court therein stated at l.c. 147:

"The reason of this rule is the evident repugnance between the fixed term and the power of arbitrary removal. The effect of this rule is that the right to hold during a fixed term can only be overcome by an express grant of power to remove at pleasure."

We also note that Sections 106.220, RSMo 1969 et seq. which are applicable prescribe a procedure for removal of such county officers.

We conclude in answer to your first question that the county court has no authority to "dismiss" members of the building commission.

In answer to your second question which asks whether a public hearing is necessary to amend the building code it is our view that the statute is clear in this respect in that Section 64.180 provides in part:

"The regulations adopted shall be applicable to the unincorporated territory of the county, except as otherwise provided herein, and may from time to time be amended by the county court after hearings are held and notice given, as prescribed herein." (Emphasis Added)

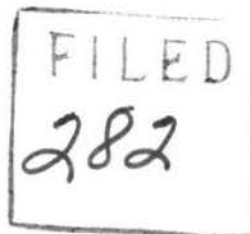
Very truly yours,

JOHN C. DANFORTH
Attorney General

September 22, 1971

OPINION LETTER NO. 282
Answer by letter-Nowotny

Honorable William S. Brandom
Prosecuting Attorney
Clay County Courthouse
Liberty, Missouri 64068



Dear Mr. Brandom:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"Would you please remit to this office an opinion answering the following questions:

What authority does either the Prosecuting Attorney or the County Health Department of Clay County, Missouri, have to control the activities of persons, firms or cities within the confines of third and fourth class cities on violations pursuant to the following problems:

- a. The disposal of wastes, i.e. solid sewage, debris and refuse;
- b. The creation of conditions that will be condusive [sic] to the spread of contagious and communicable diseases;
- c. The pollution of streams;
- d. The pollution of water used as a source of water for the citizens in third class cities, fourth class cities or villages;

Honorable William S. Brandom

- e. The pollution of air by the burning of refuse material."

Since your questions are of such broad implication concerning the authority of the prosecuting attorney and the county health department and you have not given us any specific question relating to any particular fact situation, we cannot attempt to give complete answers to your questions. Therefore, we only attempt to refer you to existing statutes that we are aware of concerning statutory duties of the prosecuting attorney and the county health department in the areas listed in your letter.

A

The disposal of solid sewage, debris and refuse.

There are several statutes relating to littering and the depositing of waste in public areas which are enforced by the prosecuting attorney. They are Sections 229.150, 304.160 and 564.480, RSMo. Section 564.480 was repealed and reenacted by House Bill Nos. 93 and 129 of the 76th General Assembly effective September 28, 1971.

Sections 64.460 through 64.490, RSMo, provide for a county option dumping law. Under Section 64.483 the county court of any county may order that Sections 64.460 to 64.490 shall be operative in the county. If the provisions are operative in a county, no person shall dispose of ashes, garbage, rubbish or refuse at any place except a licensed disposal area. Section 64.463. Licenses are issued by the county court after an inspection and report by the Missouri Division of Health. Section 64.470. The county court may revoke the license for cause. Section 64.473.

The prosecuting attorney, then, would have the duty to represent the county court in any such revocation proceeding. In addition, Section 64.487 makes violation of Sections 64.460 to 64.487 a misdemeanor, which, of course, would be enforced by the prosecuting attorney.

We draw your attention to Section 64.480 which reads in part:

" . . . Sections 64.460 to 64.487 shall not apply to any disposal areas operated by or under the control of any city, town or village and being located within the boundaries of such city, town or village."

B

Contagious and communicable diseases.

Honorable William S. Brandom

Chapter 192, RSMo, provides for a Missouri Division of Health which is given certain duties relating to the control of contagious or communicable diseases. The basic provision is Section 192.020, reading as follows:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state."

The county courts of the counties of Missouri may appoint a county health officer. Section 192.260. Their duties are as follows:

"It shall be the duty of the county health officers to enforce the rules and regulations of the division of health throughout their respective counties outside of incorporated cities which maintain a health officer. The health officers for incorporated cities of less than seventy-five thousand population shall enforce the rules and regulations of the division of health within their respective cities. Any county health officer who neglects or refuses to perform his duties as required by this chapter shall be deemed guilty of a misdemeanor. In case of dereliction of duty or refusal to act on the part of the county health officer of any county, the division of health may at its discretion declare the office of county health officer for that county vacant." Section 192.280

Enforcement of rules relating to contagious and communicable diseases are by the prosecuting attorney as follows:

Honorable William S. Brandom

"Any person or persons violating any of the provisions of this chapter or any of the orders, findings, rules or regulations made by the division of health in accordance with this chapter, or who shall leave any pesthouse, or isolation hospital, or quarantined house or place without the consent of the health officer having jurisdiction, or who evades or breaks quarantine or knowingly conceals a case of contagious, infectious, or communicable disease, or who removes, destroys, obstructs from view, or tears down any quarantine card, cloth or notice posted by the attending physician or by the health officer, or by direction of a proper health officer, shall be deemed guilty of a misdemeanor." Section 192.320

C

Pollution of streams.

The basic water pollution law is Chapter 204, RSMo, and the prosecuting attorney is given authority to enforce the provisions of this law by two sections.

Section 204.170 makes violation of any provision of Chapter 204 or of orders of the Missouri Water Pollution Board a misdemeanor. In addition, the prosecuting attorney is authorized to bring suit for injunctive relief to enforce Chapter 204. Section 204.100.

In addition to Chapter 204, Sections 564.010 and 564.480, RSMo, make it a misdemeanor to put certain waste in streams and Section 252.210, RSMo, makes it a misdemeanor to cause any deleterious substance to be placed, run or drained into any waters of the state which injure, stupefy or kill fish. Section 564.010 was repealed and reenacted by House Bill No. 72 of the 76th General Assembly effective September 28, 1971.

D

Pollution of drinking water.

The only statutes we are aware of specifically relating to drinking water are Sections 192.180 through 192.220, RSMo. Section 192.180 empowers the Division of Health to make and enforce rules and regulations for the maintenance of a safe quality of water dispensed to the public. However, Section 192.220 provides as follows:

Honorable William S. Brandom

"Nothing in sections 192.180 to 192.220 shall apply to the municipal water supply in cities in which a constant supervision of the said city water supply to insure a safe quality of water dispensed is conducted by or is acceptable to the city department of health of that city."

Again, enforcement of the provisions of Chapter 192 and the rules and regulations of the Division of Health is by misdemeanor. Section 192.320.

E

Air pollution.

The basic air pollution law is Chapter 203, RSMo. This law is enforced by the Missouri Air Conservation Commission with civil actions to be brought by the Attorney General of Missouri. Section 203.160, RSMo. We find no specific powers or duties conferred or imposed on the prosecuting attorney or the county health department.

We assume that no action has been taken by any political subdivision in your county under provisions of Section 203.140, RSMo.

Since your request does not state any specific facts concerning any of these problems as they may relate to third and fourth class cities, we are unable to comment further.

We hope that the above references will be of help to you. If you should have additional questions concerning interpretation of any of the statutory duties or authorities listed in reference to a specific factual situation, we will, of course, render an opinion on such questions.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ASSESSORS:
COLLECTORS:
ST. LOUIS CITY:

Neither the collector nor assessor
of the City of St. Louis may charge
fees for issuing statements certi-
fying that no personal property

taxes are owing for the preceding year to persons who are entitled
to such statements under Section 301.025, RSMo 1969.

OPINION NO. 284

June 28, 1971

Honorable James F. Conway
Representative, District 65
3811 Flora Place
St. Louis, Missouri 63110



Dear Representative Conway:

This is in response to your request for an opinion on the
following question concerning the personal property tax receipt
needed to obtain a motor vehicle license.

"Does the St. Louis City Assessor have
the authority, first, to issue a tax receipt
or a "clearance" indicating that no taxes are
due, and, secondly, does the St. Louis City
Collector or St. Louis City Assessor have the
authority to charge a fee for issuing a tax
receipt or a "clearance" indicating that no
taxes are due?"

As your request points out, Section 301.025, RSMo 1969, pro-
vides:

"No state registration license to operate any
motor vehicle in this state shall be issued
unless the application for license is accom-
panied by a tax receipt or a statement certi-
fied by the county or township collector of
the county or township in which the applicant's
property was assessed showing that the state
and county tangible personal property taxes
for the preceding year have been paid by the
applicant or that no such taxes were due. Every
county and township collector shall give each
person a tax receipt or a certified statement
of tangible personal property taxes paid. Where
no such taxes are due each such collector shall,
upon request, certify such fact and transmit
such statement to the person making the request.

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The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms."

With respect to the collector of the City of St. Louis, Section 52.220, RSMo 1969, provides:

"The collector of the city of St. Louis shall collect the state taxes in the limits of said city in the same manner and to the same extent, and do and perform all other things and matters appertaining thereto, as fully to all intents and purposes as now required, or which may be required, of the county collectors."

The duties of the assessor of the City of St. Louis are found in Sections 82.540 through 82.590, RSMo 1969. Those sections make no provision for the assessor issuing the type of certified statement required to obtain a state motor vehicle registration under Section 301.025, RSMo 1969. Since a public official only has such authority as is conferred by law, it is the opinion of this office that the assessor of the City of St. Louis has no authority to issue statements necessary to obtain a state motor vehicle license or to charge for such statements.

With respect to the St. Louis City collector, under Section 52.220, supra, he is required to perform the duties in the City of St. Louis as are required of the county collector in other portions of the state. Therefore, it is the St. Louis City collector's responsibility when requested to issue the receipt contemplated by Section 301.025, RSMo 1969, when his records show that an applicant for a state motor vehicle license owes no personal property tax.

We find no statutes that authorize a fee for such a statement. Article VI, Section 12 of the Missouri Constitution provides:

"All public officers in the City of St. Louis and all state and county officers in counties having 100,000 or more inhabitants, excepting public administrators and notaries public, shall be compensated for their services by salaries only."

Therefore, the St. Louis County collector is not entitled to compensation by way of a fee for performing the statutory duty required by Section 301.025, RSMo 1969, in issuing a statement that no personal property taxes are owing.

Honorable James F. Conway

The question of whether he may collect such a fee for the benefit of the City of St. Louis, and not as compensation, must also be considered. We find no statutory authorization for such a fee. The general rule is found in McQuillin on Municipal Corporations, Volume 10, paragraph 29.08, where it is stated:

"A city may not enter into a contract under which it exacts compensation from a citizen for the performance of a public duty imposed on it by law, either expressly or by implication. . . ."

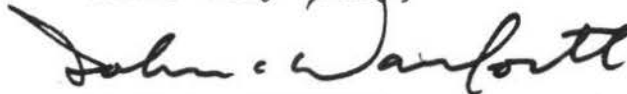
The Supreme Court of Missouri has reached a conclusion consistent with that general rule. In *State ex rel. State Highway Commission v. Union Electric Co. of Missouri*, 142 S.W.2d 1099 (St.L. Ct.App. 1940), the court held that since a public utility has a right by statute to use a public highway for its poles, lines, etc., the State Highway Commission was without authority to collect compensation from the utility for exercising the right which was given them by law. Therefore, absent statutory authorization, the City of St. Louis may not charge individuals for the statements that the city collector is required to issue under Section 301.025, RSMo 1969.

CONCLUSION

It is the opinion of this office that neither the collector nor assessor of the City of St. Louis may charge fees for issuing statements certifying that no personal property taxes are owing for the preceding year to persons who are entitled to such statements under Section 301.025, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

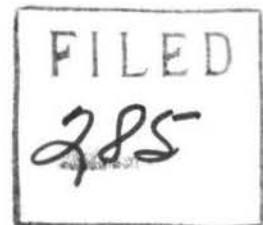


JOHN C. DANFORTH
Attorney General

November 12, 1971

OPINION LETTER NO. 285
Answer by letter-Jones

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement
System of Missouri
P. O. Box 268
Jefferson City, Missouri 65101



Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion in regard to whether or not, two or more, or if necessary, all five members of the board of trustees, may enter into a partnership agreement for the sole purpose of accomplishing the registration of securities owned by the Public School Retirement System of Missouri and also the Nonteacher School Employee Retirement System of Missouri in a "Nominee Name"?

It is our understanding that the partnership would enter into separate contracts with each retirement system which, among other things, would provide:

- "1. That neither the partnership nor its members shall have any beneficiary interest in the securities.
- "2. That any of the partners shall sign any necessary documents for the transfer of said securities as instructed by the system."

You state that the present registration of securities in the corporate name of each Retirement System does not constitute "good delivery in the event of sale." You further state that under the rules of the New York Stock Exchange, payments for such sales cannot be demanded until the transfer is approved by the transfer agent. You indicate that experience has shown that weeks of delay can be

Mr. G. L. Donahoe

involved in such transfers, which results in delay in the reinvestment of sale proceeds at considerable loss of income to the system. It is further indicated with the "Nominee Name" registration, immediate payment could be demanded upon delivery of the securities to the broker on the regular settlement date, with no attendant loss of income on the reinvestment of the proceeds.

Finally, you state that the nominee name to be selected would be used exclusively for the registration of securities owned by each retirement system and control of the investment and reinvestment of the assets of each retirement system would remain subject to the investment procedures as adopted by the board of trustees. The sole purpose of registration of the securities in a "Nominee Name" would be to facilitate the orderly collection of sale proceeds.

Subsection 3 of Section 169.040, RSMo 1969, relating to the Public School Retirement System of Missouri, reads as follows:

"No investment transaction authorized by the board shall be handled by any company or firm in which a member of the board has an interest, nor shall any member of the board profit directly or indirectly from any such investment. All investments shall be made in the name of the retirement system." (emphasis ours)

Similarly, subsection 3 of Section 169.630, RSMo 1969, relating to the Nonteacher School Employee Retirement System of Missouri, reads as follows:

"No investment transaction authorized by the board shall be handled by any company or firm in which a member of the board has an interest, nor shall any member of the board profit directly or indirectly from any such investment. All investments shall be made in the name of the retirement system." (emphasis ours)

As a result of the above, subsection 3 of Section 169.040, RSMo, relating to the Public School Retirement System of Missouri and subsection 3 of Section 169.630, RSMo, relating to the Nonteacher School Employee Retirement System each expressly provides that "all investments shall be made in the name of the retirement system." It is our opinion that these statutory provisions each refer specifically to the Public School Retirement System of Missouri and the Nonteacher Employee Retirement System respectively, and we find no statutory authority in Chapter 169 for the board of trustees to consent to the use or adoption of a nominee name. In this regard, there is authority for the proposition that where statutes are plain, unambiguous, and clear, there is no room for construction and they must

Mr. G. L. Donahoe

be applied by courts as they are written by the legislature. United Air Lines, Inc. v. State Tax Commission, 377 S.W.2d 444 (Mo. banc 1964).

It is our view that the board of trustees does not have authority to accomplish the registration of securities owned by the Public School Retirement System of Missouri or the Nonteacher School Employee Retirement System of Missouri in a "Nominee Name."

Yours very truly,

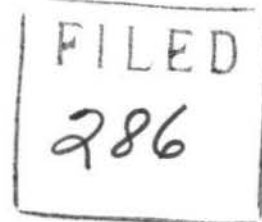
JOHN C. DANFORTH
Attorney General

May 26, 1971

Answer by letter-Mansur

OPINION LETTER NO. 286

Honorable Gene McNary
Prosecuting Attorney
St. Louis County Courthouse
Clayton, Missouri 63105



Dear Mr. McNary:

This is in response to your request for an opinion from this office as follows:

"This is a request for an opinion concerning the enforcement of the Billboard Provision of Chapter 226 R.S. Mo. We are confronted with the question as to whether an interstate trucking company which uses interstate highways and attaches frames with posters to each side of the trailer is in violation of this Chapter. These posters advertise products sold nationally and are apparently for advertising purposes only since the products carried in the trailers are not necessarily those on the posters.

"I would appreciate an opinion as to whether this is a violation under Sections 226.500-600 R.S. Mo."

In substance you inquire whether a truck or trailer traveling on interstate highways with posters on the side of the trailer truck is in violation of Sections 226.500 to 226.600, RSMo 1969.

Section 226.500, RSMo, to which you refer, provides:

"The general assembly finds and declares that outdoor advertising is a legitimate commercial

Honorable Gene McNary

use of private property adjacent to the interstate and primary highway systems and that it is necessary to regulate and control same to promote highway safety, to promote convenience and enjoyment of highway travel, and to preserve the natural scenic beauty of highways and adjacent areas. The general assembly further declares it to be the policy of this state that the erection and maintenance of outdoor advertising in areas adjacent to the interstate and primary highway systems be regulated in accordance with sections 226.500 to 226.600 and rules and regulations promulgated by the state highway commission pursuant thereto." (emphasis supplied)

The cardinal rule of statutory construction is to seek the intention of the lawmakers and, if possible effectuate that intention, and should ascribe to the language used its plain and rational meaning. State ex rel. LeNeve v. Moore, 408 S.W.2d 47. The intent and purpose of the law as expressed by the legislature governs. State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33.

The intent and purpose of the General Assembly to enacting Section 226.600, RSMo, as stated in Section 226.500 is to regulate and control outdoor advertising on private property adjacent to the interstate and primary highways of this state. There is no language used in the act indicating that it applies to any form of advertising on the interstate or primary highways or on the right-of-way of such highways.

It is the opinion of this office that a truck or trailer traveling on interstate highways with advertising posters mounted thereon does not violate the provisions of Sections 226.500 to 226.600, RSMo.

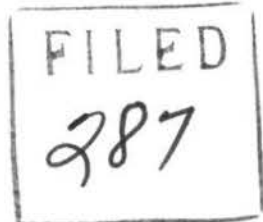
Yours very truly,

JOHN C. DANFORTH
Attorney General

July 19, 1971

OPINION LETTER NO. 287
Answer by letter-Mansur

Mr. Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This is in response to your request for an official opinion from this office which reads as follows:

"I should like to ask your opinion on the following matter:

"Section 182.010, RSMo, provides for the creation of a county library district and for the levy of a tax to support that library.

"Section 182.020, RSMo, particularly in paragraph 3, provides for the reconsideration of the tax for a county library district 'as in the case of establishing such county library district.'

"We presume that State Statutes provide similar methods for the citizens to vote for the creation of, and tax levies for, other public services.

"We should like to inquire whether it is possible for the voters to be asked to vote on two such matters, simultaneously, in the same ballot proposition.

"For example, a county has a county library district which is supported by a 2 mill tax

Mr. Charles O'Halloran

but has no ambulance service. Certain citizens wish to seek voter approval of a .5 mill tax for ambulance service. Can the proposition proposed to the voters be worded something like the following:

☐ For a 1.5 mill tax for a free county library and a .5 mill tax for county ambulance service.

☐ Against a 1.5 mill tax for a free county library and a .5 mill tax for county ambulance service.

"As you can see, the above proposal is in effect to transfer funds from one purpose to another so that total taxes are not increased. This leads to a further question: Could the voters in the above county be asked to pass upon the following proposition:

☐ For transferring .5 mill tax from the county library fund to the ambulance service fund.

☐ Against transferring .5 mill tax from the county library fund to the ambulance service fund.

"I would appreciate your opinion on this."

You first inquire whether it is possible to submit to the voters a tax for a free county library and a tax for a county ambulance service on the same ballot as one proposition. It is our view this cannot be done.

Section 182.010, RSMo 1969, provides for the creation of county library districts. Such a district may consist of the entire area of the county or it may consist of only that area of the county outside of the territory of all cities and towns in the county which maintain and control free public and tax supported libraries.

The tax provided for in Section 182.020, is a tax only against the property in the county library district which, as stated above, may consist of all of the territory within the county or only part of the territory within the county. In any event, it is clear that

Mr. Charles O'Halloran

the county library district is a separate entity from the county. In view of this, we believe it to be perfectly clear that there could not be a single proposition to levy taxes for a county library district and to levy county taxes anymore than there could be one ballot proposition for levying city taxes and county taxes.

Further, the principles of law regarding the submission of more than one proposition to the voters as a single proposition is stated in 29 C.J.S., Elections, paragraph 170, l.c. 477, as follows:

"Two or more propositions may be submitted on the same ballot, provided the voter is given the opportunity to vote for or against each question submitted separately and independent from his vote for or against the other propositions submitted, since it is well settled that two or more distinct propositions cannot be submitted as a single question. Where more than one proposition is to be submitted under some statutes, the proposition must be separately numbered and printed."

These principles of law have been enunciated by our Supreme Court on numerous occasions.

In State ex rel. Pike County v. Gordon, 268 Mo. 321, the Supreme Court held a proposition to issue bonds amounting to \$75,000 to build a courthouse at the county seat and \$25,000 to build another courthouse in another town in the county when submitted as one combined and joint proposition was illegal. The court stated, l.c. 329, as follows:

"2. Tested by the general rule, is the question submitted to the voters of Pike County single or does it contain two separate purposes? The proceeds of the bonds were to be used for (1) a county (or circuit) courthouse at Bowling Green, and (2) for a common pleas courthouse at Louisiana. The submission combined the two. The voters could vote for both courthouses or against both court houses. No opportunity was given to vote for one and against the other. This appears from the face of the question submitted.

"(a) 'The will of the people, expressed by the adoption of the proposition for the borrowing or expenditure of money . . . is

Mr. Charles O'Halloran

the law of the land. The force and effect thus imparted to their will is intended to be given to that will freely expressed. . . . Why should the force and effect of law be given to the vote adopting any proposition which has not rested wholly on its merits for the favor it has obtained at the hands of the people, but which may have been assisted to the votes it received, by other questions, with which it was so connected as that it must stand or fall with them?' [McMillan v. Lee County, 3 Iowa, 1.c. 320.] 'If they' (two propositions) 'are submitted together . . . the voter . . . has no liberty of choice.' [Gray v. Mount, 45 Iowa, 1.c. 595.]

"All elections, as well for measures as men, should be perfectly free, uninfluenced by any consideration, other than the merits of the individual man or measure proposed.' [Supervisors v. Railroad, 21 Ill. 1.c. 373.]

"Two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission.' [Lewis v. Comrs., 12 Kan. 1.c. 213.]

"This is the doctrine approved in State ex rel. v. Wilder, 217 Mo. 1.c. 270, and cases cited.

"(b) In State ex rel. v. Allen, 178 Mo. 555, this court recognized the rule, approving the doctrine in McBryde v. City of Montezano, 7 Wash. 69. The court held, however, that a proposition to issue bonds for the acquisition, by purchase or construction, of an electric light plant, was single. The end, the court said, was the same, the board of trustees being left to determine the method."

In State ex rel. City of Bethany v. Allen, 186 Mo. 673, the question submitted proposed an issuance of bonds for the purpose of the erection and the furnishing of a city hall, city prison and

Mr. Charles O'Halloran

hosehouse and for the repair and improvement of a water and light plant, extension of mains, wires, etc. The court held this contained "at least two separate and distinct propositions" and refused to order the bonds registered.

In State ex rel. City of Joplin v. Wilder, 217 Mo. 261, 1.c. 269, a proposition was submitted to issue bonds to construct a sanitary sewer in one district in Joplin and a storm sewer in another district thereof. The court, unanimously, held the submission double. The court's opinion reviewed previous decisions. The court held that none of these decisions supported relator's contention that a submission proposing to issue bonds to raise funds to build two separate courthouses, in separate cities, for different courts and for different amounts, contained but one object and was single.

County libraries are governed by the provisions of Sections 182.010 to 182.120, RSMo. Section 182.020, RSMo, provides that if a majority of all the votes cast at the election for establishing a county library district and a tax rate for a free county library is in favor of establishing a free county library, thereafter such county library district shall be considered as established and the tax specified shall be collected, from year-to-year, and deposited in the county treasury to be kept in a fund known as "County Library Fund" and dispersed on warrants drawn by the county library board.

Under Section 67.300, RSMo, county ambulance service may be established by the county court for the purpose of transporting sick or injured persons to hospitals or other places for treatment of illness or injury. This section further provides that the county court may acquire by gift or purchase the necessary vehicles and operate the same or contract for such services. The establishment and operation of the ambulance services is under the control and jurisdiction of the county court.

We are unable to see any connection or relationship between the establishment and operation of a county library district and the establishment or furnishing of county ambulance service. The expenditure of the tax money voted for the support and maintenance of the county library is under the control of the county library board of trustees. The establishing and operation of county ambulance service is under the jurisdiction and control of the county court and expenditure of any funds for that purpose is under the control of the county court. Taxes for the establishment and support of a county library requires only a majority vote whereas an increased tax rate for ambulance service under Section 137.065, RSMo, requires a two-thirds majority vote.

In answer to your second question whether the voters could be asked to vote for a transfer of a five-tenths mill tax from the

Mr. Charles O'Halloran

county library fund to the ambulance service fund, it is our opinion it cannot be done.

We find no statute authorizing such a proposition to be submitted to the voters. An election cannot be held unless it is specifically provided for by law, State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785.

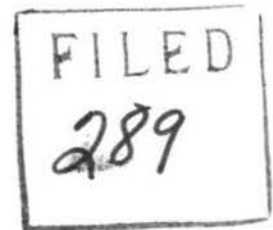
Yours very truly,

JOHN C. DANFORTH
Attorney General

September 14, 1971

OPINION LETTER NO. 289
Answer by letter-Jones

Mr. O'Garlan C. Ricks
Member of the Board
Embalmers & Funeral Directors
107 South Fifth Street
Elsberry, Missouri 63343



Dear Mr. Ricks:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to an interpretation of Section 333.031, RSMo 1969, concerning the question as to whether an individual who has made an application for a license to practice embalming, not accompanied by any fee, and who has subsequently made an application for a license to practice funeral directing accompanied by a fee of forty dollars, must pay a fee of ten dollars or forty dollars in order to receive his license to practice embalming.

In connection with the above, Section 333.031, RSMo 1969, provides in part as follows:

"Each application for a license to practice either embalming or funeral directing shall be in writing, addressed to the board, on forms prescribed by the board and shall be verified and shall contain such information as is required by the board. Except as provided in subsection 6 of section 333.041, each application shall be accompanied by a fee of forty dollars except that a holder of a license to practice embalming shall be licensed to practice funeral directing upon the payment of a fee of ten dollars. Any applicant for both a license to practice embalming and to practice funeral directing shall pay a fee of fifty dollars. . . ."

Mr. O'Garlan C. Ricks

The assumption is made that subsection 6 of Section 333.041, RSMo 1969, is not applicable as this statutory provision relates to the granting of a funeral director's license to an individual who is a resident of this state or a contiguous and adjacent county of another state and who was engaged in the practice of embalming or funeral directing prior to 1965.

It is our understanding that the individual in question has made an application for a license to practice embalming, not accompanied by any fee, and has subsequently made an application to practice funeral directing accompanied by a fee of forty dollars. It should be noted that the statute provides that "each application shall be accompanied by a fee of forty dollars." In this regard, when used in statutes, the word "shall" is generally regarded as mandatory and one which must be given a compulsory meaning. Stanfield v. Swenson, 381 F.2d 755 (8th Cir. 1967). Therefore, it is our view that the individual's application to practice embalming should not have been accepted unless it was accompanied by a fee of forty dollars.

However, to answer the question presented in which an individual has made an application to practice embalming without payment of a fee and then subsequently made an application to practice funeral directing accompanied by a fee of forty dollars, it is also our view that under the provisions of the above statute an individual is required to pay forty dollars to obtain a license to practice embalming regardless when his application to practice funeral directing is submitted. Section 333.031, RSMo 1969, provides in part that each application shall be accompanied by a fee of forty dollars except that a holder of a license to practice embalming shall be licensed to practice funeral directing upon the payment of a fee of ten dollars. The statute does not say that a holder of a license to practice funeral directing shall be licensed to practice embalming upon the payment of a fee of ten dollars. It is only when an individual applies for licenses to practice embalming and to practice funeral directing that a fee of fifty dollars is payable. In this connection, there is authority for the view that when a statute enumerates the subjects or things on which it is to operate, or the persons affected, it is to be construed as excluding from its effect all those not expressly mentioned, Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. 1965). In addition, it has been held that the primary purpose of all statutory construction is to determine the intent of the legislature. State ex rel. Schwab v. Riley, 417 S.W.2d 1 (Mo. banc 1967). Subsection 1 of Section 333.041, RSMo 1969, relating to qualifications of applicants for a license to practice funeral directing requires an individual to be at least twenty-one years of age, a person of good moral character and either a citizen and bona fide resident of the

Mr. O'Garlan C. Ricks

state or entitled to a license under the nonresident provisions of Section 333.051, RSMo 1969. On the other hand, subsection 2 of Section 333.041, RSMo 1969, relating to qualifications of applicants for a license to practice embalming, not only requires an individual to be at least twenty-one years of age and a person of good moral character, but also requires that he personally embalm at least twenty-five dead human bodies, that he is a graduate of an accredited institute of mortuary science and that he take an examination on various subjects relating to embalming. Consequently, it is our view that because it is more difficult to obtain a license to practice embalming, the legislature intended that an individual be required to pay forty dollars to obtain said license.

As a result of the above, it is our opinion that under the factual situation presented, an individual who is not a holder of a license to practice embalming, but who makes application for a license to practice funeral directing accompanied by a fee of forty dollars, is also required to pay a fee of forty dollars when he makes an application for a license to practice embalming.

Yours very truly,

JOHN C. DANFORTH
Attorney General

BOAT COMMISSION:
CRIMINAL LAW:

The Missouri Boat Commission
is authorized to establish
speed limit zones on the water-
ways of Missouri and to enforce compliance with such regulations.

OPINION NO. 292

June 25, 1971

Honorable William H. Bolinger
Prosecuting Attorney
Morgan County
Versailles, Missouri 65084



Dear Mr. Bolinger:

This official opinion is issued pursuant to the request contained in your letter concerning the authority of the Missouri Boat Commission to establish speed limits for watercraft.

Chapter 306, RSMo 1969, sets forth the law relating to regulation of watercraft. Section 306.124,3 states:

"The Missouri boat commission after a public hearing pursuant to notice thereof published not less than ten days prior thereto in each county to be affected may provide for the uniform marking of the water areas in this state through the placement of aids to navigation and regulatory markers. . . ."

Section 306.124,2 states:

"'Regulatory Markers' means any anchored or fixed markers in or on the water or signs on the shore or on bridges over the water other than aids to navigation and shall include but not be limited to bathing markers, speed zone markers, information markers, danger zone markers, boat keep out areas, and mooring buoys."

Section 306.124,5 provides:

"It shall be unlawful for any person to operate a vessel on the waters of this state in a manner other than that prescribed or permitted by regulatory markers."

Honorable William H. Bolinger

Section 306.210,1 states:

"Any person who violates any of the provisions of sections 306.020 to 306.070 and 306.090 to 306.150 shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than one hundred dollars for each violation."

The Missouri Boat Commission was created by Section 301.161, RSMo 1969, and it is expressly provided that the Commission may appoint Deputy Boat Commissioners who shall be under the control and supervision of the Commission and who are invested with the powers and duties prescribed by Chapter 306, RSMo 1969. Furthermore, Section 306.165, RSMo 1969, as amended by Senate Bill No. 2, 76th General Assembly, which becomes effective 90 days following adjournment of the legislature, grants to such Deputy Commissioners the powers of a peace officer to enforce all laws of this state upon any of its waterways, except search and seizure.

It is our view that the authority to establish speed limits on the waterways of this state is expressly given to the Missouri Boat Commission by the statutes mentioned above. Furthermore, the power to enforce adherence to regulatory markers is a necessary implication of the express grant of power contained in such statutes. The nomenclature used in describing the regulatory markers as for example, "Idle Speed Only," "No Wake," "Five Miles An Hour" is immaterial.

Of course, it is necessary that the Boat Commission comply with the statute in establishing such markers by holding public hearings and by making the system uniform throughout the state. When this is done it follows that the Commission has considerable latitude in exercising its discretion for the purpose of carrying out the details of administration of the law. This discretionary authority would in our opinion include authority to determine the types of areas where markers are needed and within these categories the desirability of establishing individual markers.

The fact that the system for marking is required to be uniform would tend to avoid arbitrary or capricious action by the Commission.

CONCLUSION

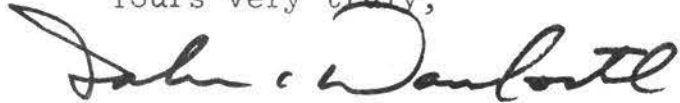
It is therefore the opinion of this office that the Missouri Boat Commission is authorized to establish speed limit zones on

Honorable William H. Bolinger

the waterways of Missouri and to enforce compliance with such regulations.

The foregoing opinion which I hereby approve was prepared by my assistant, John E. Park.

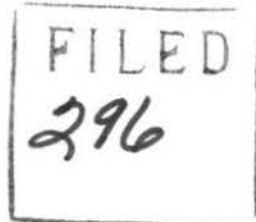
Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

June 15, 1971

OPINION LETTER NO. 296
Answer by letter-Wieler



Honorable Robert S. Wiley
Prosecuting Attorney
Stone County Courthouse
Galena, Missouri 65656

Dear Mr. Wiley:

This is in response to your request for an opinion as to the meaning of certain language contained in Sections 50.800 and 493.050, RSMo 1969.

Section 493.050, RSMo 1969, in pertinent part, reads as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semiweekly, or weekly newspapers of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; . . ."

Section 50.800, RSMo 1969, reads, in pertinent part, as follows:

"1. On or about the first Monday in March of each year, the county court of each county shall prepare and publish in some newspaper of general circulation published in the county, if there is one, . . . a detailed financial statement of the county . . ."

With respect to Section 493.050, you have asked whether the phrase "in the county where located" refers to the real estate mentioned within that section or to the newspaper. It is our opinion that the phrase obviously refers to the location of the real estate

Honorable Robert S. Wiley

involved. The intent of this statute was to provide those living in the area where a particular piece of real estate is located with information concerning any impending legal action affecting the title to such real estate.

Your second question deals with the term "publication" or "publish." Specifically, you have asked for our opinion as to whether certain newspapers are published in your county. Factually, you have set forth the following information respecting three newspapers circulated throughout your county:

"The Crane Chronicle and the Stone County Republican are two newspapers printed and published by the Stone County Publishing Company. The main office of both newspapers is in Crane, Stone County, Missouri, and the papers are distributed from Crane, Stone County, Missouri, by second class mail. However, the printing occurs in Cassville, Barry County, Missouri.

"The Table Rock Gazette is a newspaper published by Larimer Publications of Green Forest, Arkansas. The Gazette is distributed by second class mail from Green Forest, Arkansas and is circulated in Stone County. Printing of the Gazette is done at Green Forest, Arkansas, but the main business office of the Gazette is in Kimberling City, Stone County, Missouri."

Enclosed is a copy of Opinion No. 5, issued November 2, 1933, to Mr. E. T. Barnes, wherein it was held that it was not necessary, under similar statutes, that the mechanical printing be done in the area where publication is required. That is, in the absence of an express statutory requirement that the printing and publishing be done in a particular city or county, printing is not a required element of publication. With respect to the requirement of publication in general, we note that 73 C.J.S., Publish-Publisher, Section 82, pages 1250-1251, states a variety of interpretations given to the words "publish" and "publisher." In the context of the statutes under consideration and assuming, as you have in your question, that the newspapers are otherwise qualified, without passing upon the other qualifications of the three newspapers to which you refer, it is our opinion that the Crane Chronicle and the Stone County Republican are published in Stone County.

However, the Table Rock Gazette, under the facts stated, is not "published" in Stone County. In our view, although this newspaper has its "main business office" in Stone County, it does not

Honorable Robert S. Wiley

qualify as a newspaper of general circulation published in the county under the provisions of Section 50.800, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 5
11-2-33, Barnes

June 23, 1971

Answered by Letter - Mansur
OPINION LETTER NO. 297



Honorable James E. Spain
State Representative
One Hundred Fifty-first District
Bloomfield, Missouri 63825

Dear Representative Spain:

This is in response to your request for an opinion from this office as follows:

"Would you please furnish me with an Attorney General's Opinion concerning whether or not a corporate official having the title, Chairman of the Board and Chief Executive Officer, can sign stock certificates under the provisions of Section 351.295 RSMo. Would you also advise whether or not these signatures may be made by facsimile."

Subsequently to this request, you informed me your question is whether the chairman of the board and chief executive officer of the corporation may sign the certificates of stock instead of the president or vice president of the corporation and whether facimile signatures may be used by the president and vice president and other officers of a corporation mentioned in Section 351.295, RSMo.

Section 351.295, RSMo 1969, to which you refer, provides in part as follows:

Honorable James E. Spain

"1. The shares of every corporation organized under the laws of this state shall, except as otherwise provided in the articles of association or bylaws of such corporation, be represented by certificates signed by the president or a vice president and the secretary or an assistant secretary or the treasurer or assistant treasurer and sealed with the seal of the corporation. Such seal may be facsimile, engraved or printed. Where any such certificate is signed by a transfer agent or transfer clerk or by a registrar, the signatures of any such president, vice president, secretary, assistant secretary, treasurer or assistant treasurer upon such certificate may be facsimiles, engraved or printed. . . ."

It is our view that under this statute, unless the corporation under the articles of association or bylaws has provided otherwise, stock certificates issued by the corporation are required to be signed by the president or vice president and secretary or assistant secretary or treasurer or assistant treasurer and there is no provision or authorization for the chairman of the board and chief executive officer of such corporation to sign such certificate instead of the president or vice president.

It is our view that under this statute, unless the certificate is to be signed by the transfer agent or transfer clerk or by a registrar, facsimile signatures cannot be used for the officers who are required to sign said certificates under this statute.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SEX:
LABOR:
HUMAN RIGHTS:
FEMALE LABOR:

Chapter 296, RSMo 1969, empowers the Missouri Commission on Human Rights to receive, investigate, conciliate and prosecute complaints of unlawful employment practices

based on sex, and to conduct hearings and issue such orders as are deemed appropriate in each case.

OPINION NO. 298

November 24, 1971

Honorable James G. Baker
Representative, District No. 3
104 East 41st Street
Kansas City, Missouri 64111



Dear Representative Baker:

This is in response to your request for an opinion from this office as follows:

"I am writing to request your opinion regarding the powers and duties of the Missouri Commission on Human Rights relating to sex discrimination. You will note that in 296.020 RSMo discrimination based on sex is made an unlawful employment practice. However, when the powers and duties of the commission are spelled out in 296.030 RSMo, there is no reference to discrimination on the basis of sex. I assume that this was merely an oversight, but I understand that the question has been raised as to the powers of the commission relative to discrimination based on sex and in particular regarding the commission's powers to hold hearings as provided for in 296.030 (8) RSMo."

When first enacted in 1961, Chapter 296, RSMo, entitled "Discriminatory Employment Practices," proscribed various employment practices, if practiced by certain employers because of "race, creed, color, religion, national origin, or ancestry," and empowered and charged the Missouri Commission on Human rights "To seek to eliminate and prevent discrimination in employment because of race, creed, color, religion, national origin, or ancestry . . ." (Laws 1961, page 439, Sections 1 through 3). See also, Sections 296.010, 296.020, and 296.030, RSMo Supp. 1963.

In 1965 the General Assembly repealed Sections 296.010, 296.020, and 296.050, RSMo Supp. 1963 and enacted in lieu thereof three new sections numbered the same. Laws 1965, page 442.

Honorable James G. Baker

The only change which bears on this opinion is the addition of the word "sex" to the new litany that appears in Section 296.020, RSMo 1969, which we quote in part:

"Unlawful employment practices defined.--It shall be an unlawful employment practice:

(1) For an employer, because of the race, creed, color, religion, national origin, sex or ancestry of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, creed, color, religion, national origin, sex, or ancestry; or

(b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, creed, color, religion, national origin, sex, or ancestry;"
(Emphasis added)

This phrase containing the word "sex" appears in no other section in this chapter. Section 296.030, RSMo 1969, providing for the functions, powers and duties of the commission, empowers the commission to take action in cases of discrimination because of race, creed, color, religion, national origin or ancestry. Such section does not grant to the commission powers to act in cases of discrimination because of sex.

The failure to amend Section 296.030 to include the word "sex" appears to have been an oversight on the part of the legislature, but as a general rule an omission cannot be supplied even when it is apparent that the omission resulted from legislative inadvertence. C.J.S., Statutes, Section 328, page 35. The Missouri Supreme Court recently expressed this general rule in State ex rel. Mercantile National Bank at Dallas v. Rooney, 402 S.W.2d 354, 362 (Mo. banc 1966):

"[T]he court cannot supply that which the legislature has, either deliberately, or inadvertently, or through lack of foresight, omitted from the controlling statutes. . . ."

Honorable James G. Baker

However, it is our opinion that interpolation of the word "sex" in Section 296.030 is not necessary to empower the Missouri Commission on Human Rights to act in this area of discrimination. The scope and breadth of Section 296.040, RSMo 1969, fully confers jurisdiction on the Missouri Commission on Human Rights to receive, conciliate and prosecute complaints of unlawful employment practices based on sex. Selected quotations from Section 290.040 clearly demonstrate this point:

"1. Any person claiming to be aggrieved by an unlawful employment practice may, . . . file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of, . . .

"2. After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice . . .

"3. In case of failure to eliminate such practice, the chairman of the commission, . . . shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, . . .

"4. The case in support of the complaint shall be presented before the commission by the office of the attorney general of the state of Missouri, . . .

* * *

"6. If upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful employment practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to

Honorable James G. Baker

cease and desist from such unlawful employment practice . . ." (Section 296.040, RSMo 1969, emphasis added)

The phrase "unlawful employment practice" is defined by Section 296.020 to include a variety of employment practices which are unlawful if based on any of the following criteria:

". . . race, creed, color, religion, national origin, sex, or ancestry . . ."

This phrase is repeated fourteen times in Section 296.020, RSMo 1969. It is clear then that the legislature fully intended the Missouri Commission on Human Rights to exercise its powers in processing complaints of unlawful employment practices based on sex and conferred jurisdiction on the commission in Section 296.040 to do so. Further, this construction harmonizes with the legislative instruction contained in Section 296.070:

"The provisions of this chapter shall be construed liberally for the accomplishments of the purposes thereof, . . ."

CONCLUSION

It is the opinion of this office that Chapter 296, RSMo 1969, empowers the Missouri Commission on Human Rights to receive, investigate, conciliate and prosecute complaints of unlawful employment practices based on sex, and further to conduct hearings and issue such orders as are deemed appropriate in each case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Leland B. Curtis.

Yours very truly,



JOHN C. DANFORTH
Attorney General

UTILITIES:
PREVAILING WAGES:
CITIES, TOWNS & VILLAGES:

The installation of publicly owned lighting equipment for streets and thoroughfares in municipalities by Union Electric or any other company

pursuant to contract with such municipalities involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act. Installation of lighting equipment for streets and thoroughfares by Union Electric or another public utility pursuant to an agreement with a municipality whereby ownership of such equipment is transferred to the utility company with the agreement that such ownership will be returned to the municipality upon completion of the installation involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act.

OPINION NO. 299

June 14, 1971

Mr. James J. Butler, Chairman
Industrial Commission of Missouri
P. O. Box 599
Jefferson City, Missouri 65101



Dear Mr. Butler:

This is in response to your request for an official opinion concerning the applicability of the Missouri Prevailing Wage Act, as contained in Sections 290.210 to 290.345, RSMo 1969, to situations wherein municipalities in this state enter into contracts with the Union Electric Company or other public utilities for the installation of all necessary lighting equipment for the streets, alleys, overpasses, underpasses, clover leaf intersections, bridges, approaches, and other public places within such municipalities concomitant to the signing of long term contracts with the utility company for the supply of electric power for such lighting.

It is our understanding that most, if not all, of this equipment is purchased and owned by the public bodies involved when the installation is made by the utility company pursuant to contract; and that installation involves the digging of holes for poured bases to which metal poles and fixtures will be bolted, building forms for concrete work, pouring whatever concrete is necessary, installing poles, and attaching all necessary wiring.

Section 290.230 requires that all workmen employed by and on behalf of any public body engaged in the construction of public works be paid, at a minimum, prevailing hourly rate of wages for work of a similar character in the locality in which the work is being performed. Section 290.250 requires any public body undertaking or advertising for bids for the construction of public works

Mr. James J. Butler

to seek a determination of the prevailing hourly rate of wages and that such determination be attached to and made a part of the specifications for the work.

The term "public works" is defined as follows:

"'Public works' means all fixed works constructed for public use or benefit or paid for wholly or in part out of public funds. . . ." (Section 290.210(7), RSMo 1969)

Enclosed is a copy of Opinion No. 32, issued October 20, 1970, to the Honorable Richard M. Marshall in which we discussed the term "public works" and found it to mean structural works having a permanent character and usefulness, such as roads, buildings, bridges, and dams. On page three of that opinion, we noted the case of *Miele v. Joseph*, 280 App. Div. 408, 113 N.Y.S.2d 689 (1952) wherein it was held that the term "public works" embraced such things as bridges, sidewalks, traffic control signals, radio antennas, and park benches. Lighting equipment of the type mentioned would be very similar to a traffic device and, in our opinion, would be within the definition of the term "fixed work" as used in Section 290.210(7).

Installation of such equipment would fall within the definition of "construction" as defined in Section 290.210(1):

"'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair."

Thus, installation of such lighting equipment involves the construction of a public work and it is necessary for municipalities and public bodies contemplating such construction to seek wage determinations from the Department of Labor and Industrial Relations and include such determinations in the specifications for such work before contracting for installation of such equipment with Union Electric or any other company.

In your letter, you also discuss a possible situation in which a municipality purchases all equipment necessary for lighting and transfers ownership of such equipment to Union Electric or another public utility with the understanding that title will be returned to the municipality upon completion of the installation of such equipment by the company. The question asked was whether such an agreement would successfully circumvent the requirements of the Missouri Prevailing Wage Act.

Mr. James J. Butler

First of all, any transfer of equipment owned by a municipality in this state to a private company would have to be for full value in order to avoid the prohibition of Article VI, Section 23 of the Missouri Constitution which forbids the granting of public money or things of value by a county, city or other political subdivision to or in aid of any corporation, association or individual. Assuming, therefore, that a transfer for value is made of all equipment and supplies necessary to install lighting facilities by a municipality to a public utility with the agreement that title to such equipment would be returned to the public body upon completion of the installation, it is our opinion that the Missouri Prevailing Wage Act applies to the actual construction of such equipment even though title thereto lies in the private company. By entering into such an agreement, the municipality is obviously contemplating the construction of fixed works for public use or benefit. In view of the agreement by the company to return ownership of such lighting equipment following installation to the municipality, it can hardly be argued that the construction of such equipment is not for public use or benefit. Inasmuch as this activity falls within the definition of "public works" as laid out in Section 290.210(7), the provisions of the Prevailing Wage Act apply.

CONCLUSION

It is the opinion of this office that the installation of publicly owned lighting equipment for streets and thoroughfares in municipalities by Union Electric or any other company pursuant to contract with such municipalities involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act.

Installation of lighting equipment for streets and thoroughfares by Union Electric or another public utility pursuant to an agreement with a municipality whereby ownership of such equipment is transferred to the utility company with the agreement that such ownership will be returned to the municipality upon completion of the installation involves "construction" of "public works" as such terms are defined in the Missouri Prevailing Wage Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 32
10-20-70, Marshall



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 3, 1971

OPINION LETTER NO. 300
Answered by Klaffenbach

Honorable Samuel J. Short, Jr.
Prosecuting Attorney
Cedar County
2nd Floor Court House
Stockton, Missouri 65785



Dear Mr. Short:

This letter is in answer to your opinion request in which you ask the following:

"Is it the duty of a County Clerk in a 3rd Class County to furnish a Certified copy of an Order of the County Court to anyone requesting the same and willing to pay the statutory fee for same and if he is required to furnish said copy and refuses is he guilty of a Misdemeanor in office for failure to furnish said copy and may be removed from office for this failure to do so.

"Also may a County Court of a 3rd Class County, legally order the County Clerk to refuse to furnish a certified copy of its order to anyone requesting said copy and willing to pay the statutory fee for same. If the County Court may not legally so order, then are its members so ordering guilty of a Misdemeanor in office and subject to be removed from office."

You have also indicated that you wish an early reply and for that reason we have necessarily limited the extent of our research and the length of this opinion.

We note that we are not able to find any previous opinions of this office on the subject and likewise find no directly related Missouri cases.

The clerk's duties are set out in general terms in Section 51.120, RSMo 1969, and there is no where within that provision any express requirement that the clerk must provide such a certified

Honorable Samuel J. Short, Jr.

copy. However, it is quite apparent that there are many well established duties to such an office which are inherent and necessary to the proper discharge of the office. In this instance, we note that the fee schedule which is set out in Section 51.410, RSMo 1969, authorizes "[f]or every rule or order not hereinbefore specified, or copy thereof" a fifteen cent fee and also authorizes "[f]or every certificate and seal not hereinbefore provided for" a fifty cent fee.

Under Section 51.300, RSMo 1969, the clerk of the county court of such a county is placed on a compensation schedule and must deposit all such fees received by him in the county treasury. Further, under Section 51.390, RSMo 1969, it is the duty of such a clerk to charge and collect in all cases every fee accruing to his office by law, except such fees as are chargeable to the county.

We note also that the Missouri Constitution Section 7 of Article VI requires the county courts to "keep an accurate record of its proceedings". The Legislature also has required that the clerk shall keep an accurate record of the orders, rules and proceedings of the county court and that he make a complete alphabetical index thereto. Section 51.120, RSMo 1969.

The present situation is of course somewhat complicated by the fact that the court was changed to an administrative body by the 1945 Constitution. Missouri Constitution Section 7, Article VI. However, it appears that a certified copy of the county court's order is still admissible in evidence despite the change in the status of the county court. That is, in State v. St. Clair, 262 SW2d 25, 28 (1953) the Missouri Supreme Court stated:

"[5] At the time the judgment was rendered, county courts were courts of record under the provisions of Art. 6, § 36, of the Constitution of 1875, V.A.M.S., and by the express provisions of Section 490.130 RSMo 1949, V.A.M.S., copies of their proceedings, attested by the clerk, with the seal of the court attached, are admissible in evidence. And, although such courts are no longer courts of record, yet, by the provisions of Art. 6, § 7, of the Constitution of 1945, V.A.M.S., they are required to keep an accurate record of their proceedings. Consequently, their records, certified as above stated, are admissible without further identification. State v. Worden, 331 Mo. 566, 56 S.W.2d 595, 598. . . . "

It is our view therefore that a person has a right to such a certified copy as long as he is willing to pay the statutory fee. Whether or not the clerk is guilty of a misdemeanor for failing to perform his duties pursuant to Section 51.270, RSMo 1969, depends

Honorable Samuel J. Short, Jr.

upon whether his conduct can be shown to have been willful or corrupt. State ex rel v. Hixon, 41 Mo. 211 (1867). See also State ex rel v. Bowen, 41 Mo. 217 (1867). Of course any such clerk who is convicted for any misdemeanor in office could be removed from office. Section 51.250, RSMo 1969.

Inasmuch as we have concluded that the county clerk must furnish a certified copy of an order of the county court to any person willing to pay the statutory fee for such an order, it follows that the county court is without authority to order the clerk to refuse to furnish such a certified copy since such an order would be in effect ordering the clerk not to perform his duty. Whether or not the County Judges are then guilty of a misdemeanor in office and subject to be removed is a question we would not venture to answer for the reason that under these circumstances a conclusion based upon this question would be too speculative. The Missouri Supreme Court has expressed its views with respect to such actions in State v. Fletchall, 412 SW2d 423 (1967).

Very truly yours,

JOHN C. DANFORTH
Attorney General

May 27, 1971

OPINION LETTER NO. 302
Answer by Letter (Bartlett)

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan for fiscal year 1972, under Title III of the Elementary and Secondary Education Act of 1965.

Our review has taken into consideration Title III of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended; the Federal Regulations (45 C.F.R. 118, draft of March 19, 1971); Article III, Section 38(a) and Article IX, Section 2(a), Missouri Constitution; Section 162.092, RSMo 1969, and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 305(a)(1), Public Law 89-10, Title III, as amended;
2. The Missouri State Board of Education has authority under State law to develop, submit and administer, either directly or through arrangements with other State or local public agencies, the State Plan;
3. The State Educational Agency named in the attached State Plan for Title III of the Elementary and Secondary Education Act of 1965, is the agency

Dr. Arthur L. Mallory

responsible for the administration of the State Plan;

4. State law does not prohibit children enrolled in any one or more non-profit, private elementary or secondary schools of such State in the area or areas served by programs authorized by this Title from effective participation on an equitable basis in such programs (the undersigned does not certify to the accuracy of paragraph 16 of the assurances portion of the State Plan);
5. The State Treasurer has authority under State law to receive, hold and disperse, in accordance with the State Plan, funds received under Title III;
6. All provisions of the State Plan are consistent with State law with the exception of paragraph 16.

In conjunction with this Letter Opinion which constitutes our official certification of the State Plan, we have completed a certification form consistent with this Opinion Letter.

Very truly yours,

JOHN C. DANFORTH
Attorney General

CERTIFICATE OF ATTORNEY GENERAL

I, John C. Danforth, Attorney General of Missouri, hereby certify that:

1. The Missouri State Board of Education is the "State Educational Agency" required by Section 305(a)(1), Public Law 89-10, Title III, as amended;
2. The Missouri State Board of Education has the authority under State law to develop, submit and administer, either directly or through arrangements with other State or local public agencies, the State Plan;
3. The State Educational Agency named in the attached State Plan for Title III of the Elementary and Secondary Education Act of 1965, is the agency responsible for the administration of this plan;
4. State law does not prohibit children enrolled in any one or more non-profit, private elementary or secondary schools of such State in the area or areas served by programs authorized by this Title from effective participation on an equitable basis in such programs (the undersigned does not certify to the accuracy of paragraph 16 of the assurances portion of the State Plan);
5. The State Treasurer has authority under State law to receive, hold and disperse, in accordance with the State Plan, funds received under Title III, and
6. All provisions of the State Plan are consistent with State law with the exception of paragraph 16.

JOHN C. DANFORTH
Attorney General of Missouri

Dated: May 27, 1971.

Approved by:

United States Commissioner of Education

Dated: _____

ELECTIONS:

NURSING HOME DISTRICTS:

1. It is mandatory that the board of directors of a nursing home district, which on three separate occasions refused to approve a bond issue for the construction of a nursing home, submit to the voters the proposition of the dissolution of said district. 2. Elections held prior to the enactment of Section 198.360, RSMo 1969, shall be considered as being within the provisions of this section in determining the number of elections in which the voters have refused to approve a bond issue.

OPINION NO. 304

July 20, 1971

Honorable Ronald M. Belt
Representative, District 96
108 Vine
Macon, Missouri 63552



Dear Representative Belt:

This is in response to your request for an opinion from this office as follows:

"On September 15, 1964 the Clarence Nursing Home district was created by a vote of the people. The district was created under authority of the Nursing Home Act of 1963 which is incorporated in the Statutes as section 198.200 - 198.360.

"On three separate [sic] occasions to wit: May 11, 1965; June 22, 1965; and March 21, 1967 a bond issue was submitted in the district for the purpose of construction of a nursing home. On each occasion the bond issue failed and to date no nursing home has been constructed nor is one operated by the district. They have been levying the nursing home district tax as provided in the statutes.

"Section 198.360 Revised Statutes of Missouri was enacted in 1969 and reads as follows:

'Dissolution of district.--In any nursing home district created under the provisions of chapter 198, RSMo 1967 Supp. which is not operating a nursing home, and in which the voters of said district have on

Honorable Ronald M. Belt

three separate occasions refused to approve a bond issue for the construction of a nursing home, the board of said district shall submit to the voters the proposition of the dissolution of the district. If a majority of the voters approve the dissolution, said district shall be dissolved and any tax money in the treasury shall be rebated to the original taxpayer on a pro rata basis.'

"My question is: 'Must the Nursing Home District in which the voters on three separate occasions refused to pass a bond issue prior to enactment of section 198.360 submit to the people the proposition of dissolution of the district?'"

You inquire whether the board of directors of a nursing home district in which the voters on three separate occasions refused to pass a bond issue prior to the enactment of Section 198.360, RSMo 1969, must submit to the people the proposition of dissolution of the district.

Section 198.360, RSMo 1969, to which you refer provides:

"In any nursing home district created under the provisions of chapter 198, RSMo 1967 Supp. which is not operating a nursing home, and in which the voters of said district have on three separate occasions refused to approve a bond issue for the construction of a nursing home, the board of said district shall submit to the voters the proposition of the dissolution of the district. If a majority of the voters approve the dissolution, said district shall be dissolved and any tax money in the treasury shall be rebated to the original taxpayer on a pro rata basis."

Under this section, which was enacted in 1969, the board of directors of a nursing home district which is not operating a nursing home, "shall" submit to the voters the proposition of dissolution of the district if the voters of said district have on three separate occasions refused to approve a bond issue for the construction of a nursing home. Usually, the use of the word "shall" indicates a mandate, and unless there are other things in the statutes, it indicates a mandatory statute. State ex rel. Stevens v. Wurdeman, 295 Mo. 566, 246 S.W. 189 (banc 1922).

Honorable Ronald M. Belt

It is the opinion of this office that under this statute it is mandatory that the board of directors of a nursing home district, which is not operating a nursing home, submit to the voters the proposition of dissolution of such district after the voters on three separate occasions have refused to vote bonds for the construction of a nursing home.

The question now arises as to whether this statute applies retroactively or retrospectively. That is, whether the elections held prior to the enactment of Section 198.360, supra, are to be considered or whether the elections have to be held after the enactment of this statute.

Article I, Section 13, Constitution of Missouri, provides as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The first question to be decided is whether the legislature intended the statute under consideration to operate retrospectively or prospectively. As a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts or by necessary or unavoidable implication. *Jamison v. Zausch*, 227 Mo. 406, 126 S.W. 1023, 1027 (1910); *State ex rel. Harvey v. Wright*, 251 Mo. 325, 158 S.W. 823, 829(12) (en banc 1913); *Barbieri v. Morris*, 315 S.W.2d 711, 714(4) (Mo. 1958); 82 C.J.S., Statutes, Section 414, page 981. Many cases hold that acts of the legislature must be held to operate prospectively only, unless a different legislative intention is clearly to be gathered from their terms. *Clark Estate Co. v. Gentry*, 362 Mo. 80, 240 S.W.2d 124, 129(6) (Mo. 1951);

This statute provides that any nursing home district which is not operating a nursing home and in which the voters of said district "have" upon three separate occasions refused to approve a bond issue for the construction of a nursing home, the board of directors shall submit to the voters the question of the dissolution of such district. From the language used, it is clear that the legislature intended the statute to apply to elections held prior to the enactment of this statute as well as those held subsequent to its enactment. It is our view the language used in this statute of the past tense indicates that was the intent of the legislature when it enacted the statute. *State ex rel. LeNeve v. Moore*, 408 S.W.2d 47 (Mo. banc 1966); *Barbieri v. Morris*, 315 S.W.2d 711 (Mo. 1958).

Honorable Ronald M. Belt

This leaves only the question of whether this results in the statute being "retrospective in its operation" in violation of Article I, Section 13 of the Constitution. In *Dye v. school District No. 32 of Pulaski County*, 355 Mo. 231, 195 S.W.2d 874 (en banc 1946) the court considered the effect of a statute enacted on April 23, 1943, which became effective on November 22, 1943 (ninety days after adjournment of the General Assembly), on the contract of a teacher dated April 23, 1943, to teach in a public school during the school year 1943-1944. The statute under consideration required every school board ". . .to notify each and every such teacher in writing concerning his or her re-employment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give such notice shall constitute re-employment on the same terms * * *." Contention was made that this statute did not apply to the contract executed prior to the effective date of the statute. In discussion of this matter, the court stated, l.c. 879:

"Respondents' view is that the provision of Sec. 103^{42a} extending a teacher's contract for another year in the circumstances stated therein operates retrospectively and changes the contract, itself, by imposing a new duty and making its term two years instead of one. We do not think so. A retrospective law is one that relates back to, and gives to a previous transaction, some different legal effect from that which it had under the law when it occurred. A statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. Here, the original contract itself was not affected, and the appellant is not complaining. The new law merely imposed a statutory duty on both parties to give notice of its continuance or not. The public interest was involved. The respondents had almost five months in which to give notice after the statute became operative. It is necessary that such arrangements be made in advance. The State, with respect to its school boards, had the right to waive or impair its own vested rights, if any."

A nursing home district is a public agency created by virtue of a statute enacted by the legislature. It is similar to school districts formed under statutory provisions, and we believe the same principles of law should be applied as apply to school districts in deciding whether a statute governing the acts and the authority of a nursing home district is unconstitutional as being

Honorable Ronald M. Belt

retrospective. It is our opinion the statute under consideration does not violate Article I, Section 13, supra, of our Constitution as being retrospective when it applies to elections held prior to the enactment of such statute because it concerns a public agency in which there are no vested rights. Dye v. School District No. 32 of Pulaski County, supra; State ex rel. St. Louis Police Commissioners v. St. Louis County Court, 34 Mo. 546 (1864); Graham Paper Co. v. Gehner, 59 S.W.2d 49 (Mo. en banc 1933).

It is the opinion of this office that this statute does not violate this constitutional provision when applied to the elections held prior to the enactment of such statute. It merely relates to prior facts or transactions which existed at the time of its enactment but does not change their legal effect; it does not impair any vested right. 16 C.J.S., Constitutional Law, Section 244.

CONCLUSION

It is the opinion of this office that:

1. It is mandatory that the board of directors of a nursing home district, which on three separate occasions refused to approve a bond issue for the construction of a nursing home, submit to the voters the proposition of the dissolution of said district.
2. Elections held prior to the enactment of Section 198.360, RSMo 1969, shall be considered as being within the provisions of this section in determining the number of elections in which the voters have refused to approve a bond issue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

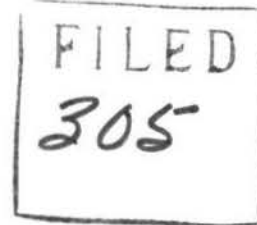


JOHN C. DANFORTH
Attorney General

June 17, 1971

OPINION LETTER NO. 305
Answered by Klaffenbach

Honorable Carl R. Noren, Director
Missouri Department of Conservation
P.O. Box 180
Jefferson City, Missouri 65101



Dear Mr. Noren:

This letter is in response to your opinion request in which you ask whether the Missouri Conservation Commission has the authority to participate in a program designated as the "Missouri Conservation Commission Employees' Insurance Program" which provides hospital coverage, major medical, and life insurance for the employees of the Conservation Commission, by assisting in the support of such a program by defraying a portion of the insurance cost out of the Commission's funds.

You have also referred to our Opinions No. 425, dated August 17, 1970 which was directed to you, No. 500, dated November 18, 1969, to the Honorable A. Basey Vanlandingham, and Opinion No. 93, dated September 9, 1969, to the Honorable William J. Cason.

In our Opinion of August 17, 1970 to you, we noted that it was our view that the Conservation Commission is given authority to set salaries and compensate its employees and is not prohibited in the form in which such compensation may be given and that therefore the Conservation Commission had authority to purchase liability insurance coverage on its employees for that period of time in which they drive motor vehicles owned by the Commission as part of the compensation of such employees.

The theory of that opinion is applicable in this instance and we are therefore of the view that as a part of such compensation, to be fixed by the Commission in accordance with the provisions of Section 42, Article IV of the Missouri Constitution, the Commission may provide such hospital, major medical and life insurance coverage for its employees.

Very truly yours,

JOHN C. DANFORTH
Attorney General

August 31, 1971

OPINION LETTER NO. 308
Answer by Letter - Craft

Honorable E. J. Cantrell
State Representative
3406 Airway
Overland, Missouri 63114



Dear Representative Cantrell:

Your letter requesting an opinion of the Attorney General reads as follows:

"I would appreciate your office's review of the opinions pertaining to the authorization of the Missouri State Auditor using State funds for the contracting of an auditing firm outside State Government to conduct audits, as the Auditor's office is charged with performing by statute.

"I would want to know the legal statute that would state precisely the Auditor's authorization for conducting these audits through outside firms other than the auditing of the Highway Department, which I find specified in the statutes."

The qualifications and duties of the State Auditor are provided for in Article IV, Section 13 of the Missouri Constitution which is amplified by Chapter 29 of the Revised Statutes of Missouri, 1969.

The Auditor's office has advised this office that the only audit which has been performed by an auditing firm outside of state government is the audit of the State Auditor's office itself.

Honorable E. J. Cantrell

That is, all audits thus far have been conducted by the Office of the Auditor except the audit of the Auditor's office which was performed under contract with a private firm.

Section 29.200, RSMo 1969, provides in part as follows:

"The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. . . ."

The Auditor advises that a private firm was retained to audit his office in conformity with the Auditing Standards and Procedures, Procedure No. 33, issued by the Committee on Auditing Procedure of the American Institute of Certified Public Accountants. It is there provided in General Standards 2 that:

". . . an independence in mental attitude is to be maintained by the auditor or auditors."

The Committee report explains the type of independence which is desirable as follows:

"6. The second general standard requires that the auditor be independent; aside from being in public practice (as distinct from being in private practice), he must be without bias with respect to the client under audit, since otherwise he would lack that impartiality necessary for the dependability of his findings, however excellent his technical proficiency may be. However, independence does not imply the attitude of a prosecutor, but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners (shareholders) of a business, but also to creditors and those who may otherwise rely (in part, at least) upon the auditor's report, as in the case of prospective owners or creditors."

Impartiality is also required of the State Auditor by Section 29.070, RSMo 1969, which provides in part as follows:

"Every examiner appointed by the state auditor shall, . . . make fair and impartial examinations, . . ."

In addition, Section 29.235, RSMo 1969, provides in part as follows:

"All audits shall conform to recognized governmental auditing practices."

Honorable E. J. Cantrell

Thus the standard of impartiality which is recognized by Section 29.070 and which is more fully explained in the Standards and Procedures promulgated by the Committee on Auditing Procedure of the American Institute of Certified Public Accountants is incorporated into the standards to be used by the Missouri State Auditor by Section 29.235.

Impartiality is defined in Black's Law Dictionary, Fourth Edition as follows:

"Favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just."

In Opinion No. 249, dated July 29, 1964, to Dr. Ben Morton, this office responded to an opinion request asking whether boards of regents of state colleges were empowered to hire certified public accountants. The opinion was written in terms of the employment of independent, expert personnel to prepare periodic reports. The opinion held:

". . . Authority to employ independent expert personnel to prepare reports of information necessary for the administration of state colleges is a necessary power the boards of regents should possess to accomplish the obligations imposed by statute.

"It is therefore the opinion of this office that the boards of regents of state colleges may employ independent expert personnel to prepare periodic reports of information necessary for the administration of their institutions according to recognized standards of college administration."

Since Section 29.200, RSMo 1969 requires that the State Auditor audit his own office and since the audit standard he is to use requires an independent and impartial audit, he is empowered to retain a firm of certified public accountants to audit his office.

We conclude that the State Auditor is authorized to conduct an audit of the Auditor's office through an independent certified public accountant.

Very truly yours,

JOHN C. DANFORTH
Attorney General



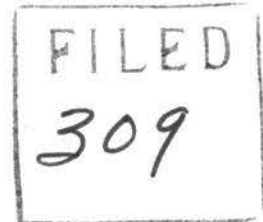
JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 4, 1971

OPINION LETTER NO. 309
Answered by Klaffenbach

Honorable Arlie H. Meyer
Missouri House of Representatives
235 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Meyer:

This letter is in response to your opinion request in which you ask whether the City of St. Charles can grant the St. Charles Historical Society an exclusive franchise to conduct tours of the historical district in such city.

In our Opinion No. 92, dated August 30, 1966, to the Honorable William L. Pannell, copy enclosed, we held that Jefferson County cannot grant a right to an organization to operate a community antenna and cable system in the county.

We are of the view that the reasoning expressed in that opinion applies in this instance and as we find no authority for the granting of such an exclusive franchise, we conclude that the city has no power to grant the franchise.

Very truly yours,

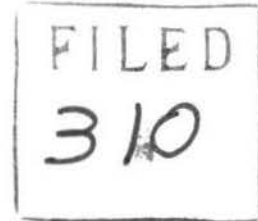
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 92
8/30/66, Pannell

August 27, 1971

OPINION LETTER NO. 310
Answer by letter-Klaffenbach

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This letter is in response to your opinion request in which you ask the following question:

"In view of the Constitution of the State of Missouri as well as both United States and State Supreme Court decisions, I should like to request an opinion from you as to whether or not the Missouri State Park Board is permitted to allow organized religious services on a regular basis in public-use facilities, including land and buildings, on areas owned or controlled by this agency."

It is our further understanding that the parks have several different types of designated areas. That is, they have areas for campers, others for picnickers, and still other areas house facilities which are rented by certain groups such as the Boy Scouts for a fee which permits them to occupy the improved facilities for a certain period of time. We also understand that the rental facilities are not open for free public use and are considered closed areas.

It is also our understanding that the present question does not involve any rental and that the churches involved wish to use any available areas which are open to the public without charge for religious services and that other non-religious groups are not given such use privileges. Such services generally are intended to be conducted on Sunday mornings and either in amphi-theaters or open areas.

Mr. Joseph Jaeger, Jr.

We also wish to point out that we are not here considering a question of the exercise of free speech in a public area but are considering the use of public facilities by a private organization for purely religious purposes whether it be non-profit or profit and whether it be an organized corporate body or an association of persons interested in a common religious objective.

Under Chapter 253 of the Missouri Revised Statutes the state parks are organized and under the control of the Missouri State Park Board. The Missouri Park Board may make and promulgate necessary and reasonable rules for the proper maintenance, improvement, acquisition and preservation of all state parks. Section 253.035, RSMo 1969. A "park" is defined under Section 253.010, RSMo 1969, as any land, site or object primarily of recreational value or of cultural value because of its scenic, historic, prehistoric, archeologic, scientific, or other distinctive characteristics or natural features.

Under Section 253.080, RSMo 1969, the Park Board has the authority to contract for the management of concessions, privileges, facilities, and conveniences within parks under the conditions and in the manner prescribed by that section. Thus although certain enterprises of a private and non-public nature may be conducted on park premises under contract without conflicting with the provisions of the Missouri Constitution, Section 38(a) of Article III, which prohibits the granting of public funds or property for private purposes, our attention in this area is directed to the question of the use of public grounds or facilities without charge, for purely religious purposes.

Constitutional prohibitions against the support of religion are contained in several sections of the Missouri Constitution.

Section 6, Article I, states:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Mr. Joseph Jaeger, Jr.

Section 7, Article I, states:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination or religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Section 8, Article IX, states:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

Thus we have an explicit interdiction against the use of public funds or public property directly or indirectly in aid of any church, sect or religion. Berghorn v. Reorganized School Dist. No. 8, 364 Mo. 121, 260 S.W.2d 573 (1953), McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953), Harfst v. Hoegen 349 Mo. 808, 163 S.W.2d 609 (1942).

And, it has been said in defining "religious worship" that "denomination, place or mode of worship is not essential, for the open fields, the woods, or the house erected for public worship are alike within its terms, and as long as it is religious worship it makes no difference whether the worshipers are Christians or pagan idolators". 76 C.J.S. Religious, p. 729.

Mr. Joseph Jaeger, Jr.

We further note that recently in the case of Tilton v. Richardson, 29 L.Ed.2d 790 (1971) the Supreme Court of the United States in considering the effect of an act of Congress which permitted the religious use of premises obtained by federal grant after the expiration of twenty years held that the conversion of the premises to religious use or to promote religious interests would have the effect of advancing religion and thus trespassed on the religion clauses of the United States Constitution.

In our view it follows in the premises that the Missouri State Park Board does not have authority to allow organized religious services on a gratuitous regular basis in public use facilities, including land and buildings, on areas owned or controlled by the Board.

Very truly yours,

JOHN C. DANFORTH
Attorney General

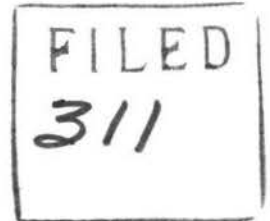
SCHOOL DISTRICTS:
BOUNDARIES:

Consolidation of municipalities does not affect boundaries of six-member school district including one of the municipalities to be consolidated.

OPINION NO. 311

June 28, 1971

Honorable Edna Eads
Representative, District 149
112 South Pine Street
Bonne Terre, Missouri 63628



Dear Representative Eads:

This official opinion is issued in response to your written request of May 24, 1971, in which you describe the proposed consolidation of six adjoining municipalities in a third class county, and ask about the effect of the proposed consolidation on the boundaries of a reorganized six-director school district which includes one of the six.

We assume that the other five municipalities in the proposed consolidation are included either in "common" or "six-director" districts as defined in Section 160.011(2) or (12), and Section 160.021, RSMo 1969.

Certain laws governing "six-director" districts are set out in Section 162.011 through 162.451, RSMo 1969. Section 162.421 provides in part as follows:

" . . . the extension of the limits of any city or town beyond the boundaries of a six-director school district in which it is included shall automatically extend the boundaries of that district to the same extent, . . . "

The section contains exceptions which are not material in view of the conclusion we reach.

The proposed plan submitted with your request does not contemplate the "extension of the limits" of any of the included municipalities. It is rather a proposal for the "consolidation" of "cities,

Honorable Edna Eads

towns, or villages" as authorized by Sections 72.150 through 72.220, RSMo 1969, which permits consolidation in certain instances with the approval of the voters of each city, town and village to be included. Under these statutes, all of the consolidating municipalities stand on an equal legal footing. It cannot be said that the boundaries of any one of them would be "extended." The separate municipalities cease to exist after consolidation and a new entity, the consolidated municipality is created.

The only statute providing for automatic extension of boundaries of a six-director school district, by reason of extension of boundaries of a city or town, does not apply to the situation you describe.

CONCLUSION

It is the opinion of this office that a consolidation of cities, towns, or villages as authorized by Section 72.150 through 72.220, RSMo 1969, does not affect the boundaries of a six-director school district which includes one of the consolidating municipalities.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,

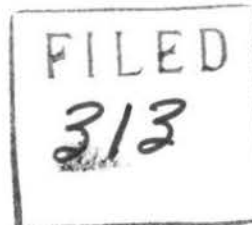
A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

August 20, 1971

OPINION LETTER No. 313
Answer by Letter - Klaffenbach

Honorable Edna Eads
Missouri House of Representatives
112 So. Pine
Bonne Terre, Missouri 63628



Dear Mrs. Eads:

This letter is in answer to your request for an opinion in which you ask whether a junior college district is required to select depositaries for demand deposits and open time deposits by bids.

We believe that your question is answered by our holding in Opinion No. 177, dated December 20, 1963, to Robert B. Mackey, in which we held in pertinent part as follows:

"In 1937, the year federal laws prohibiting payment of interest upon demand deposits became effective as to deposits of county funds, Section 110.030 RSMo was enacted. In mandatory language, this section expressly provides that 'the various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder * * * shall be applicable only if and when * * * it shall be lawful for banking institutions to pay interest on demand deposits * * * .'

"Under federal regulations (and Section 362.385, RSMo) it is unlawful for banks to pay interest upon demand deposits. In this situation, Section 110.030 expressly governs, and by its terms suspends all statutory provisions for advertisement for bids and lettings to the highest bidder. We find no provision in this section which limits the suspension of the various statutory provisions as to advertisement for bids to advertisements for demand deposits, or which require such statutory provision to be followed for that portion of deposits which may be placed upon time deposits. To hold that there is such a requirement in the face of the all-inclusive language of the statute would be to exercise legislative functions and rewrite Section 110.030."

Honorable Edna Eads

We note that Section 165.201 RSMo 1969 which is also applicable in this instance contains provisions similar to Section 110.030 RSMo 1969 and allows the selection of depositaries without bids when the payment of interest upon demand deposits is unlawful.

We conclude that the holding in opinion 177-1963 that bids are not required for either demand or time deposits at any time it is unlawful for banks to pay interest on demand deposits is applicable to junior college districts.

Very truly yours,

JOHN C. DANFORTH
Attorney General

September 29, 1971

OPINION LETTER NO. 314
Answer by letter-Wood

Mr. Robert L. Dunkeson
Executive Secretary
State Inter-Agency Council
for Outdoor Recreation
P. O. Box 564
Jefferson City, Missouri 65101



Dear Mr. Dunkeson:

You have requested my official opinion on the authority of the State Inter-Agency Council for Outdoor Recreation to provide assurances of compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646; 84 Stat 1894). The Bureau of Outdoor Recreation, United States Department of the Interior will require assurances of relocation assistance pursuant to the Act as one of the conditions of allocating Land and Water Conservation Funds (P.L. 88-578; 78 Stat 897) to the State Inter-Agency Council.

The Land and Water Conservation Fund Act of 1965 (P.L. 88-578) provides funds to be apportioned by the Secretary of the Interior to the states for ". . . not more than 50 per centum of the cost of planning, acquisition, or development [of outdoor recreation] projects that are undertaken by the State. . . ." (Section 5(c), P.L. 88-578).

Title II of the Uniform Relocation and Real Property Acquisition Policies Act of 1970 establishes a program of financial assistance to persons displaced as a result of federal or federally assisted projects. Three categories of assistance; (1) moving expenses from homes, businesses and farm operations (Section 202, P.L. 91-646); (2) replacement housing for homeowners (Section 203, id.); and (3) replacement housing for tenants (Section 204, id.), are required to be provided by any state agency receiving federal funds for any project resulting in displacement of any person after July 1,

Mr. Robert L. Dunkeson

1972 (Section 210, id.). Such relocation assistance provided by the state agency is to be included along with other costs of the project and eligible to the same extent and manner for federal funding of the project (Section 211, id.). However, relocation assistance up to \$25,000 provided by the state agency on any project displacing any person prior to July 1, 1972, is to be fully paid from federal funds (Section 211, id.).

The Inter-Agency Council for Outdoor Recreation has been designated the official state agency for liaison with the Federal Bureau of Outdoor Recreation, the agency to receive federal funds for outdoor recreation planning, and the agency to allocate such funds to appropriate state agencies and political subdivisions (Section 258.060, RSMo 1969). The Inter-Agency Council Fund has been created in the state treasury for receipt of all funds granted by the United States under the Land and Water Conservation Fund Act, and upon appropriation therefrom by the General Assembly, for disbursement by the Council (Section 258.080, RSMo 1969).

House Bill No. 94, 76th General Assembly, approved on July 13, 1971, provides in part:

"Section 1. As used in this act, the following words shall have the meaning indicated:

* * *

"(2) 'Public agency', the State of Missouri or any political subdivision or any branch, bureau or department thereof and any quasi-public corporation created or existing by law which are authorized to acquire real property for public use and which acquire any such property either partly or wholly with aid or reimbursement from Federal Funds.

"Section 2. Any public agency as defined herein which is required, as a condition to the receipt of Federal Funds, to give relocation assistance to any displaced person is hereby authorized and directed to give similar relocation assistance to displaced persons when the property involved is being acquired for the same public use through the same procedures, and is being purchased solely through expenditure of state or local funds."

Mr. Robert L. Dunkeson

We believe this law pertains only to property acquisitions funded entirely from state or local sources, and therefore inapplicable to projects administered by the Inter-Agency Council, which we understand to be in all cases financed in part from federal funds in the Inter-Agency Council Fund (Section 258.080, RSMo).

Article III, Section 38(a), Constitution of Missouri, provides in part:

" . . . Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

While we are not aware of any legislative implementation of this constitutional provision applicable to state agencies and political subdivisions generally that would specifically authorize use of state or local funds for the relocation assistance contemplated by the federal act, we believe the constitutional provision is a self-executing grant of power and adequate to authorize all state agencies and political subdivisions to use their funds, in combination with federal outdoor recreational funds, for such relocation assistance purposes.

Accordingly, we are of the opinion that the Inter-Agency Council for Outdoor Recreation can require assurances from each state agency and political subdivision applying for, and receiving federal funds administered by the Council through the Inter-Agency Council Fund, that the agency or public entity will provide the relocation assistance described in the Uniform Relocation Assistance Act (P.L. 91-646). We are further of the opinion that the Inter-Agency Council may assure the Bureau of Outdoor Recreation, United States Department of the Interior, that state and local funds may, consistent with the laws of Missouri, be used together with federal funds to provide the relocation assistance required by such federal law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

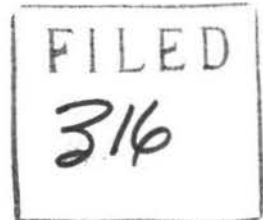
SCHOOL DISTRICTS:
SCHOOLS:
TEACHERS:
CONTRACTS:

1969, even if the rehiring of this teacher will result in the school district's receiving a lower classification from the State Board of Education.

A six-director school district in the State of Missouri must rehire a "permanent teacher" as that term is defined in the Teacher Tenure Act, Sections 168.102 to 168.130, RSMo

OPINION NO. 316

October 13, 1971



Honorable Daniel M. Buescher
Prosecuting Attorney
Franklin County Court House
Union, Missouri 63084

Dear Mr. Buescher:

This official opinion is issued in response to your request for a ruling on a question of whether a six-director school district in Missouri must rehire a "permanent teacher" if the rehiring of this teacher will result in the school district's receiving a lower classification from the State Board of Education.

From your opinion request we understand the facts underlying this request to be as follows: The teacher in question is a permanent teacher as that term is defined in the Teacher Tenure Act, Section 164.104(4). This teacher has been teaching in a school which has been annexed by another district. You advise that the State Department of Education states that the acquiring district may lose its AAA classification if this teacher, who does not have a degree, is hired.¹

We understand that the question being asked by you relates solely to whether the district must rehire the permanent teacher even if it adversely effects its classification by the State Department of Education. Because it is implicitly assumed in your request, we also are assuming that the acquiring district must hire a permanent teacher employed by the acquired district, unless the classification problem prevents it. On this point generally, see Opinion No. 186, dated July 9, 1971, a copy of which is enclosed.

Footnote

1. We are advised by the State Department of Education that its policy through the years has been not to lower a classification because a district which has recently increased its size through merger or annexation is required to honor the contracts of teachers in the old district.

Honorable Daniel M. Buescher

Under the Missouri statutes, we find no relationship between classification of school districts carried out by the State Department of Education pursuant to general authority granted to it by the legislature in Section 161.122, RSMo 1969, and the provisions of the Teacher Tenure Act, Sections 168.102 to 168.130, RSMo 1969.

Section 168.106, RSMo 1969, provides as follows:

"Indefinite contract, what affects. --
The contract between a school district and a permanent teacher shall be known as an indefinite contract and shall continue in effect for an indefinite period, subject only to:

"(1) Compulsory or optional retirement when the teacher reaches the age of retirement provided by law, or regulation established by the local board of education;

"(2) Modification by a succeeding indefinite contract or contracts in the manner hereinafter provided;

"(3) The death of the teacher;

"(4) Resignation of the teacher with the written consent of the school board;

"(5) Termination by the board of education after a hearing as herinafter provided; and

"(6) The revocation of the teacher's certificate."

This section contains the only exceptions to the indefiniteness of a permanent teacher's contract. See Opinion No. 268, dated October 6, 1971, a copy of which is enclosed. None of these authorized exceptions permit a school district to make a contract with a permanent teacher subject to changes in the boundaries of the school district or to classification requirements propounded by the State Department of Education.²

Footnote

2. Note Section 168.124, RSMo 1969, pertaining to leaves of absence in the event of "school district reorganization".

Honorable Daniel M. Buescher

Section 168.114, RSMo 1969, sets forth the only grounds upon which a school board may terminate a permanent teacher's contract:

"Board may terminate, grounds for. --

1. An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:

"(1) Physical or mental condition unfitting him to instruct or associate with children;

"(2) Immoral conduct;

"(3) Incompetency, inefficiency or insubordination in line of duty;

"(4) Willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

"(5) Excessive or unreasonable absence from performance of duties; or

"(6) Conviction of a felony or a crime involving moral turpitude.

2. In determining the professional competency of or efficiency of a permanent teacher, consideration should be given to regular and special evaluation reports prepared in accordance with the policy of the employing school district and to any written standards of performance which may have been adopted by the school board."

No provision in this section is made for terminating the indefinite contract of a permanent teacher because the teacher does not possess qualifications required by the State Department of Education in classifying school districts.

We find no intent whatsoever in the Teacher Tenure Act to make a permanent teacher's contract subject to the classification standards of the State Board of Education.

Honorable Daniel M. Buescher

CONCLUSION

Therefore, it is the conclusion of this office that a six-director school district in the State of Missouri must rehire a "permanent teacher" as that term is defined in the Teacher Tenure Act, Sections 168.102 to 168.130, RSMo 1969, even if the rehiring of this teacher will result in the school district's receiving a lower classification from the State Board of Education.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a continuous script.

JOHN C. DANFORTH
Attorney General

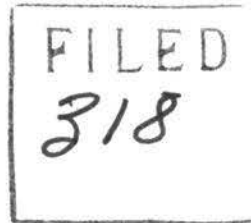
Enclosure:

Opinion No. 186, DeCoster, July 9, 1971
Opinion No. 268, Baker, October 6, 1971

June 17, 1971

OPINION LETTER NO. 318
Answer by Letter-Klaffenbach

Honorable Wm. S. Brandom
Prosecuting Attorney
Clay County
Liberty, Missouri 64068



Dear Mr. Brandom:

This letter is in answer to an opinion request by your Staff Attorney, Mr. P. Wayne Kuhlman, in which Mr. Kuhlman forwards several questions posed by the Clay County Court. The questions paraphrased are whether the Clay County Court can erect buildings and establish various administrative offices of the Clay County government as well as a Juvenile Detention Unit and a Juvenile Circuit Court room in an area outside the county seat of Liberty, Missouri.

Clay County is a second class county and as has been indicated the county seat is Liberty, Missouri.

In our Opinion No. 38, dated January 11, 1954, to the Honorable James P. Hawkins, copy enclosed, this office held that the county court of Dallas County may by proper order designate some building within the seat of justice of Dallas County other than the court house as a place to hold circuit court. We believe that the holding in that opinion applies here also in that although Section 478.225, RSMo 1969, with respect to Circuit No. 7, "Terms of Court" refers only to the county of Clay and does not designate a particular location, it is nevertheless, in the absence of any express provision to the contrary, implicit that the circuit court will be held at the county seat. Section 478.385, RSMo 1969, provides that Circuit No. 7 is composed of three divisions. However, the legislature has not provided that said divisions will be at any other location than the county seat. We find no express provision in the statutes or any provision necessarily implied giving the county court the authority to establish the circuit court or any division thereof outside of the limits of the county seat of said county.

Notably the legislature has expressly provided in various Sections, 478.205, RSMo 1969, et seq, with respect to certain circuits that circuit court will be held in cities which are not county seats.

Honorable Wm. S. Brandom

Under Section 211.331, RSMo 1969, county courts of first and second class counties have the duty to provide a place of detention for children coming within the provisions of Chapter 211. There is no express requirement that such detention facilities be located at the county seat. We are of the view that such detention facilities need not be located at the county seat but must be so located as to meet the needs of justice and the administration of the juvenile courts.

Your question also indicates that the county court desires to remove and establish certain county administrative facilities outside of the "seat of justice".

Section 49.310, RSMo 1969, provides that with some exceptions not pertinent here, the county court shall erect the court house at the established seat of justice and Section 49.370, RSMo 1969, provides that the county court shall designate the place whereon to erect any county building, on any land belonging to such county, at the established seat of justice. Section 49.380, RSMo 1969, provides that if there is no suitable land belonging to the county to erect a county building at the "established seat of justice" the county "shall select a proper piece of ground anywhere within the corporate limits of the town known as the county seat".

We further note that historically it is evident that the Constitutional Convention of 1943-44 was of the view that the administration of the county government should be located at the county seat. That is, Section 40 (19) of Article III of the Missouri Constitution prohibits the General Assembly from passing any local or special law locating or changing county seats. Likewise, Section 6 of Article VI of the Missouri Constitution prohibits the removal of county seats except by vote of two-thirds of the qualified electors of the county voting thereon at a general election.

It is our conclusion drawn from these constitutional and statutory provisions that it was not intended that the county courts would have the authority to remove the county administration from within the county seat.

We conclude in answer to your question that the Clay County Court has no authority to construct buildings for administrative offices of Clay County or for a Juvenile Division of the Circuit Court outside of the limits of Liberty, Missouri.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 38
1/11/54, Hawkins

CONFLICT OF INTEREST:
HOUSING DEVELOPMENT
COMMISSION:

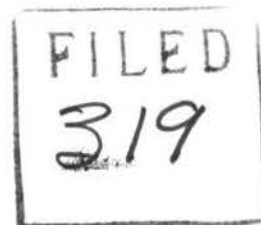
The Missouri Housing Development
Commission is not disabled from
retaining as "managing underwriter"
in the marketing of its bonds or

notes a firm engaged in the underwriting and investment banking
business, which has served as the Commission's financial adviser
in the past and which proposes to render further services as
financial adviser, without additional compensation, if selected
as managing underwriter.

OPINION NO. 319

July 14, 1971

Mr. Peter W. Salsich, Jr.
Chairman, Missouri Housing
Development Commission
3642 Lindell
St. Louis, Missouri 63108



Dear Mr. Salsich:

This official opinion is issued pursuant to your request of recent date in which you tender certain questions regarding a proposed contract between Missouri Housing Development Commission hereinafter referred to as the "Commission" and a firm generally engaged in the business described as "investment banking" or "underwriting", hereinafter referred to as the "Firm". You ask whether the arrangement presents any conflict of interest or whether there is any other reason why the contract is improper or unenforceable.

The Commission is established by Chapter 215 of the Missouri Revised Statutes of 1969, as a "governmental instrumentality of the state of Missouri" and a "body corporate and politic."

It entered into a contract with the Firm, for a consideration, which called for the rendition of financial advisory services by the Firm. Before approving this contract the Commission requested several companies in similar business to submit proposals, and considered proposals from others, before deciding to enter into the contract. It selected the Firm in the exercise of its judgment. At this time the Commission knew that the Firm was engaged in the business of "underwriting" -- issues of sec-

Mr. Peter W. Salsich, Jr.

urities -- that is, of facilitating the marketing of securities of various types. Its compensation for underwriting services is normally based on a percentage of the securities sold. No underwriting services were performed under the initial contract between the Commission and the Firm. This contract will expire June 30, 1971.

Under the present contract, the Firm has been advising the Commission on the feasibility of various financing plans including the issuance and sale of negotiable revenue bonds and notes. It has also assisted the Commission in explaining its functions and powers to potential investors.

At the present time, The Commission has under consideration a proposal for the Firm to serve as "managing underwriter" for the first bonds and notes that may be issued by the Commission. As such the Firm would be responsible for forming an "investment banking group" to submit a proposal to the Commission to purchase the bonds of the Commission for resale to investors. In addition, the Firm would conduct meetings at various places in Missouri and elsewhere to discuss with potential investors the sale of the Commission's obligations. It is also contemplated that the Firm will continue to render financial advice, in the event that it is selected as managing underwriter, and that it will receive no additional compensation for such services. The Commission would have the right to reject the Firm's bid and to negotiate with others.

You ask whether the facts as detailed above indicate any conflict of interest, or whether any other reason appears as to why the arrangement is not proper.

We have no hesitation in saying that the general powers of the Commission as set out in Section 215.030, RSMo 1969, and the specific power to issue notes and bonds as found in Section 215.120, RSMo 1969, are ample to permit the Commission to enter into contracts for financial advisory services, and to enter into underwriting agreements in order to facilitate the marketing of the bonds. The proposed contract, then appears to be within the authority of the Commission, unless there is a conflict of interest.

The Missouri conflict of interest statutes (Sections 105.450 to 105.495, RSMo 1969) manifestly do not apply to this situation. These statutes relate to the private business relationships of state officers, employees and agencies.

Any discussion of conflict of interest problems, especially in relation to the marketing of securities, should begin with the

Mr. Peter W. Salsich, Jr.

consideration of the well known and highly publicized case of United States v. Mississippi Valley Generating Co. 364 U.S. 520 (1961), involving the "Dixon-Yates" contract. A certain Mr. Wenzell was a vice president of First Boston Corporation. He undertook uncompensated service as a "consultant" to the Bureau of the Budget. As such he was one of the government negotiators in a contract for the construction of generating facilities by a group of investor owned utilities for the government. The contract would require the issuance of bonds by the utilities, and First Boston had regularly served as the underwriter for their bond issues. Wenzell did not resign his position with First Boston while serving the Bureau of the Budget, and his dual relationship was apparently known to the utilities. He had left the government service before the contract between the government and the utilities was executed. The contract was later abandoned and the utilities made a claim for breach. The Supreme Court of the United States stated the issue as follows:

" . . . whether Wenzell's executive position with First Boston and his simultaneous activities on behalf of the Government constituted an illegal conflict of interest; . . ."
Id. at 547.

The Court found that there was such a conflict. It thought that Wenzell might have been disposed to yield to the utilities' demands or suggestions during the negotiations, because unless some contract were negotiated then First Boston would not have an opportunity to get the underwriting business. It therefore, reversed the judgment of the Court of Claims and denied the utilities' claim. It concluded that the conflict rendered the contract unenforceable at the instance of parties who were aware of the dual role.

The Court placed great importance on the terms of a federal criminal statute, 18 U.S.C. 434, now repealed, which related to interested persons acting as government agents. The opinion also speaks, however, in terms of general principles of law and equity. We feel, therefore, that the present inquiry should be tested against the standards of the Mississippi Valley case.

The Mississippi Valley case is considered a very strict application of principles of conflict of interest. It found that Wenzell was a government agent even though he was described as an "adviser" and was not compensated for his services, and did not have the authority to approve or disapprove the contract. It also found that the conflict remained even though he had left the government service before the contract was executed, since

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the effect of the conflict might have been felt in the negotiations in which he had a part. Nor was the conflict eliminated because First Boston had no assurance that it would receive the underwriting business, since it had a good opportunity to get the business and would have no chance if the construction contract did not go through. Nor could the situation be saved because Wenzell's superiors in the Bureau of the Budget knew of his dual relationship, since one government agent may not consent to a violation of a conflict of interest statute by another. The case stands for the proposition that the possibility of conflict of interest on the part of one who participates in the negotiations and consummation of government contracts will render the contracts unenforceable by an opposing party who knows of the conflict.

In the situation you describe, the Firm has no authority to make or negotiate for contracts to which the Commission is a party. It has been retained to advise the Commission on matters within its special knowledge, and this knowledge is obviously gained through experience in the marketing of securities. The Commission has the responsibility for all contracts or decisions. It may accept or reject any advice given, and is not required to accept or reject any contract proposed or tendered by the Firm.

The Firm, as financial adviser, might very probably recommend financing of a type in which it regularly participates. We do not consider, however, that this situation alone presents an improper conflict of interest. The situation is indistinguishable from that of a lawyer retained to explore a problem and make recommendations. If he were to recommend litigation then this might be to his financial advantage, but a client may nevertheless employ him by reason of his skill and training. The Firm's interest in underwriting business is well known to the Commission. The mere fact that it receives advice from the Firm does not disable the Commission from dealing at arm's length.

The Court in the Mississippi Valley case was concerned about the possibility that the utilities might have demanded the exclusion or inclusion of a particular contract term, and might have told Wenzell that they would not be interested in the contract if the demand were not met. The term might have been one which was adverse to the government, to the extent that the government should not enter into a contract if the demand were met. The Court feared that Wenzell might yield the government's position in order that there would be a bond issue which First Boston might have a chance at. We see no comparable situation here. The Commission is able to deal at arms length with the Firm, and with any other contracting parties. It does not have an agent who may be tempted to yield on points of vital import-

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ance to it.

This conclusion seems consistent with Missouri authorities. The Missouri courts apply a rather strict standard of conflict of interest, as is shown by the opinion in Heit v. Bixby, 276 F.Supp. 217 (E.D. Mo. 1967), involving Missouri law and containing discussion of numerous Missouri cases. That case, however, involved a secret profit by individuals who were officers of one corporation and directors of another having contract relations with it. If the proposed profit had been disclosed in advance to all concerned, the result undoubtedly would have been different. See, e.g. Hawkins v. Mall, Inc., 444 S.W.2d 369 (Mo. 1969).

In Streett v. Laclede-Christy Company, 409 S.W.2d 691 (Mo. 1966), the court held that directors of a corporation may expend corporate funds in resisting a "takeover" bid if they are of the opinion that the takeover would be harmful to the corporation, even though they have a vested personal interest in maintaining the status quo so that they may continue to hold their offices and receive their salaries.

In Strandberg v. Kansas City, 415 S.W.2d 737 (Mo. 1967), a law firm had negotiated the sale of land under a contract which was conditioned on the rezoning of the property. One of the members of that firm was then elected mayor. (He had not participated in the work for the client, although it is doubtful that this circumstance is of great importance.) Under the charter of the city involved, rezoning had to be approved by the City Council and the mayor was a voting member of the council. As soon as the mayor took office, the firm withdrew from the employment and sent a statement for services. Some time later the rezoning matter came before the council. The mayor voted in favor of rezoning and, without his vote, the rezoning would not have passed. The court held that the professional relationship antedating his service as mayor did not disable him from voting. His only present interest was in the firm's statement for services, unpaid at the time of the suit, and the court did not feel that this was a substantial interest.

We consider, therefore, that the conflict-of-interest situation as discussed in the Mississippi Valley case is not present in the situation you inquire about, and, that under the Missouri cases just discussed, there is no invalidating conflict of interest. The Commission is free to evaluate any proposal by the Firm and to deal at arms length with the Firm. It is conceivable that the Firm's experience as financial adviser may improve its chances of securing the contract as managing under-

Mr. Peter W. Salsich, Jr.

writer, but any advantage is not achieved through conflict of interest or dual agency. The Commission has the responsibility for any contract for underwriting services. It is free to accept the Firm's proposal or to contract with others.

If the Firm were unavailable as managing underwriter, indeed, the Commission might be at a disadvantage. It should be able to accept the best proposal available, and should not be disabled from dealing with the underwriter who has the most experience and also may render the best service, unless there are compelling circumstances.

In emphasizing the Commission's authority to deal with all available underwriters we do not mean to imply that the Commission is necessarily required to invite bids for underwriting services. The Commission might conclude, in the exercise of its judgment, that it should negotiate with an individual company rather than making a public invitation. In the absence of statutory requirements as to the method for negotiation of contracts, the decision as to whether to invite competitive bids or use direct negotiation is a matter of judgment. See Otis & Co. v. Pennsylvania R. Co., 61 F.Supp. 905, (E.D. Pa. 1945), affirmed 155 F.2d 522 (3rd Cir. 1946.)

Nor do we perceive any reason why the Firm could not continue to render financial services to the Commission in an advisory capacity, after its selection as managing underwriter, and without additional compensation. Just as in the case of the lawyer, the services are of an expert nature and, although it is conceivable that the expert will benefit from additional financing of a kind in which it is active, the Commission is entitled to evaluate the advice and to deal at arms length as to any recommendations. The Commission may also take the Firm's experience and its willingness to render future services into account in deciding whether to employ the Firm as managing underwriter. These are items of value and are part of the "package" which one dealing at arms' length would evaluate.

CONCLUSION

The Missouri Housing Development Commission is not disabled from retaining as "managing underwriter" in the marketing of its bonds or notes a firm engaged in the underwriting and investment banking business, which has served as the Commission's financial adviser in the past and which proposes to render further services

Mr. Peter W. Salsich, Jr.

as financial adviser, without additional compensation, if selected as managing underwriter.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

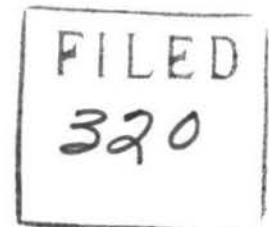
JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

OPINION LETTER NO. 320

June 9, 1971

Mr. B. W. Robinson
Assistant Commissioner
Director, Vocational Education
Department of Education
Jefferson State Building
Jefferson City, Missouri 65101



Dear Mr. Robinson:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational and Technical Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576 (20 U.S.C., Section 1241 et seq.).

It is the opinion of this office that the Missouri State Board of Education is the "state board" in this state within the meaning of Section 108(8) of Public Law 90-576. Also, we find that the Missouri State Board of Education has the authority under state law to submit a State Plan for Vocational Education and to administer or supervise the administration of same. See Sections 178.420 to 178.580, RSMo 1969. Further, we think that the provisions of this Plan can be carried out by the state; and we note that the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the State Plan for Vocational and Technical Education in Missouri and to represent the Missouri State Board of Education in all matters pertaining thereto. See Section 178.540, RSMo 1969.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

JOHN C. DANFORTH
Attorney General

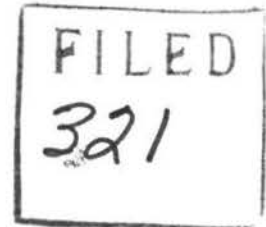
NOTARY PUBLIC:

Section 486.040, RSMo 1969, requires a notary public to have a seal which when used makes an impression on the document on which it is used.

OPINION NO. 321

July 19, 1971

Honorable Warren E. Hearnes
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Hearnes:

This is in response to your letter of May 27, 1971, requesting an official opinion from this office concerning the question whether a notary public in this state can use a rubber stamp rather than a raised seal.

We assume the rubber stamp to which you refer is a rubber stamp which when used leaves an imprint in ink.

Section 486.040, RSMo 1969, requires each notary public to have a seal. It provides:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public', the name of the county or city, if appointed for such city, in which he resides and has his office, and the name of the state; shall designate in writing, in any certificate signed by him, the date of the expiration of his commission. No notary public shall change his seal during the term for which he is appointed, and he shall authenticate therewith all his official acts, and the record and copies, certified by the proper custodian thereof, shall be received in evidence."

Webster's New International Dictionary, Second Edition, describes a seal as "Any device bearing a design so made, as by engraving, that can impart an impression in relief upon a soft tenacious substance, as clay or wax. An impression made by such a device on wax, wafer, or some other tenacious substance capable of being impressed."

Honorable Warren E. Hearnes

We have been unable to find any court decisions which describe the device or instrument used as a seal. The only cases we have found consider whether the document has been properly sealed.

At common law a seal consisted of an impression upon wax or wafer, or some other tenacious substance capable of being impressed, State ex rel. West v. Thompson, 49 Mo. 188; Alt v. Stoker, 127 Mo. 466, 30 S.W. 132.

The sufficiency of the seal of the notary on a deposition taken before a notary public was considered by the court in the case of Meyers v. Russell, 52 Mo. 26. In this case the court stated, l.c. 26:

"The defendant moved to quash a deposition taken in the cause before a Notary Public, because it was not properly attested with the notarial seal, which motion the Court overruled. In this, there was no error. The seal was affixed by an impression on paper, and that was sufficient, it was not necessary that it should be impressed on wax, according to the old common law rule."

It is our view that under Section 486.040, supra, a notarial seal must be a device with the name of the notary public inscribed thereon with the name of the county or city, if appointed for such city, in which he resides, has his office, and the name of the state so that when used it makes an impression upon the document to which it is applied.

In the 73rd General Assembly, Senate Bill No. 169 was introduced to repeal Section 486.040, RSMo, and enact in lieu thereof a new section authorizing the use of a rubber stamp facsimile of a notary seal by a notary public for official acts. This bill was not enacted.

CONCLUSION

It is the opinion of this office that Section 486.040, RSMo 1969, requires a notary public to have a seal which when used makes an impression on the document on which it is used.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



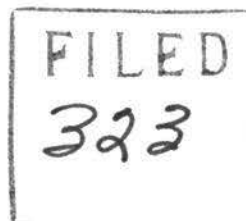
JOHN C. DANFORTH
Attorney General

June 24, 1971

OPINION LETTER NO. 323

Answer by Letter-Bartlett

Dr. Arthur L. Mallory
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Commissioner Mallory:

In accordance with your request of June 3, 1971, we have reviewed the Missouri State Board of Education's Application for Program Grant for Migratory Children (fiscal year 1972). This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended by P.L. 89-750, P.L. 90-247 and P.L. 91-230.

In addition to the Elementary and Secondary Education Act of 1965, as amended, and the regulations pursuant thereto, our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under State law to perform the duties and functions of a "state educational agency" as defined in Title I of Public Law 89-10 (20 U.S.C. Section 244) including those arising from the assurances set forth in the application and that the State Board of Education has the authority to submit and administer the special educational programs and projects for migratory children as set forth in the application.

All provisions of this application are consistent with State law with the exception of paragraph 11 B. 1. on page 8 of the application.

Dr. Arthur L. Mallory

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application. We are returning herewith two copies of the application.

Very truly yours,

JOHN C. DANFORTH
Attorney General

POULTRY:
AGRICULTURE:

1. "The Missouri State Poultry Association" has authority to publish and make available to the public the results of their experiments with poultry in this state. 2. "The Missouri State Poultry Association" members in the performance of their duties are not personally liable for acts not maliciously done.

OPINION NO. 329

October 7, 1971

Mr. Charles W. McElyea, Director
Missouri Poultry Experiment
Station
P. O. Box 530
Mountain Grove, Missouri 65711



Dear Mr. McElyea:

This is in response to your request for an opinion from this office as follows:

"We would like to run our egg production tests on all strains of layers that are available to Missouri producers by purchasing the baby chicks on the open market without the knowledge of the breeders and publish reports based on our testing program. The breeders would not make an entry nor pay an entry fee as is now required."

"What would be the legal aspects on the Poultry Board if they were to decide to sample and test all commercial type egg producers of eggs sold in the State of Missouri and publishing the report as public information? A copy of our latest final report is enclosed to give you an idea of the detailed information it encompasses."

We understand you want to know if there is any personal liability of the members of the board in publishing the report.

The law governing "The Missouri State Poultry Association" and the State Poultry Experiment Station is found in Chapter 262, RSMo.

The first question that arises concerns the authority of "The Missouri State Poultry Association" and the State Poultry Experiment Station to conduct experiments with the different varieties of poultry and eggs and make the results of their experiments available to the public.

Mr. Charles W. McElyea, Director

"The Missouri State Poultry Association" is created by Section 262.100, RSMo 1969, as a body corporate with perpetual succession, power to sue and be sued, and to complain and defend in all courts.

Section 262.110, RSMo 1969, defines the duties of "The Missouri State Poultry Association" in part as follows:

"1. It shall be the duty of the state board of poultry to promote and encourage the poultry industry in the state of Missouri in all its branches; to organize the poultry raisers of the state, for the purpose of affording a systematic means for gathering useful information for the use of the board, and to publish the same for the benefit of the farmers and poultry raisers of the state of Missouri. It shall be their duty to gather poultry statistics and information as to the best and most profitable means of raising and handling poultry and publish the same in bulletins as frequently as may be deemed expedient; hold poultry institutes in different sections of the state, for the purpose of giving instructions in the breeding and raising of poultry; provide for and manage one annual state poultry exhibition at such time and place as may be determined by the board; provide lectures for the promoting and encouraging the poultry interests of the state."

Section 262.200, RSMo 1969, authorizes "The Missouri State Poultry Association" to establish a state poultry experiment station and defines its function in part as follows:

"1. In order to determine and demonstrate the importance of improved and better methods of feeding, housing, incubation, brooding, breeding and rearing of poultry, and to bring the results of scientific research of state and federal experiment stations within the reach of all farmers and poultry raisers of Missouri, the state poultry board shall establish, conduct and maintain a state poultry experiment station. The objects and purposes of said experiment station shall be to experiment with the different kinds of houses, incubators, brooders, and appliances, and the different varieties of poultry, to determine which are best adapted to the farmers and poultry raisers

Mr. Charles W. McElyea, Director

of Missouri, in the different sections thereof, to make a study of different diseases to which poultry is subject, and the remedies to prevent such diseases and to make all other experiments and tests and do any and all other things which shall tend to the betterment of the poultry interests of the state.

* * *

"5. It shall be the duty of said secretary, so far as possible, to verify such experiments and results and to embody such of them as he deems advisable and of public interest in his annual reports, bulletins and publications. The state poultry board shall print an annual report and shall carefully digest and compile the results obtained as a result of experiments conducted at this station and publish the same from time to time in their reports and in bulletin form in language as free from technicalities as possible, for free distribution to the farmers of the state, to the public libraries, to the governor, and the members of the general assembly, and elsewhere as the judgment of the board may direct." (emphasis supplied)

It is our view that under these above statutory provisions "The Missouri State Poultry Association" and the State Poultry Experiment Station have authority to conduct experiments with the different kinds and varieties of poultry and eggs to determine which are best adapted to the farmers and poultry raisers of Missouri in the different sections of the state and to do any and all things necessary in conducting the experiments and testing they think will be to the betterment of the poultry industry of the state. It is our view also that "The Missouri State Poultry Association" has express authority to compile the results obtained as a result of experiments conducted at the State Poultry Experiment Station and publish the same from time to time in their reports and in bulletins for free distribution to the farmers of the state, to the public libraries, and elsewhere as the judgment of the Board may direct.

As we understand, you want to know the legal liability of "The Missouri State Poultry Association" members in making the results of their experiments in the different types of poultry as public information. In 3 C.J.S., Agriculture, paragraph 6, page 377, the general rule is stated as follows:

Mr. Charles W. McElyea, Director

"The general rule is that an agricultural board as an agent of the state in the exercise of governmental functions, is not subject to the liability of a private or quasi-public corporation. Unless the right of action is expressly given by statute, the board is not liable for an injury because of the negligence of an officer or employee, and, although expressly providing that the state board of agriculture may sue and be sued, the statute, creating the board as an agency of the state, does not refer to liability on a tort but has reference only to obligations incurred by contract in the management of the department of agriculture; but it has been held that although the state board of agriculture is a public organization for public purposes only, if under the statute creating it the board is a corporate entity, it may be sued."

Section 262.130, RSMo 1969, provides for the Governor to appoint six members of "The Missouri State Poultry Association" for definite terms of office and to serve until their successors are appointed and qualified. It is our view they are state officers. State ex inf. McKittrick v. Langston, 84 S.W.2d 131 (Mo. 1935); State ex rel. Walker v. Bus, 135 Mo. 325 (1896).

In 67 C.J.S., Officers, paragraph 125, page 417, the general rule regarding liability of public officers is stated as follows:

"As a general rule and apart from statute, public officers, when acting in good faith within the scope of their authority, are not liable in private actions, and the application of this rule of immunity cannot be avoided by allegations that the officer involved was acting or is being sued in his personal capacity. Mistakes of judgment, or improper construction of the law defining his duties, by a public officer acting in the discharge of his official duties do not give rise to a personal action against him, although some individual may suffer loss as a result thereof. However, immunity from suit as an attribute of sovereignty cannot be invoked by public officers when sued for their own torts, and one cannot escape the consequences of his wrongful act on the ground that it was an official act."

Mr. Charles W. McElyea, Director

In *Edwards v. Ferguson*, 73 Mo. 686 (1881), the court held that public officers who are invested with discretionary powers in the performance of duties cannot be held to a personal liability for acts not maliciously done.

In *Sharp v. Kurth*, 245 S.W. 636 (St.L.Ct.App. 1922), the court held that special commissioners of a road district are not liable for their mistake of judgment or acts of negligence in doing work. The court state, l.c. 638, as follows:

"It is likewise clear that the individual defendants, being special commissioners of the road district, are not liable for their mistakes of judgment or their acts of negligence in doing work. In *Cook v. Hecht*, 64 Mo. App. 273, loc. cit. 279, it is said:

'These road overseers are statutory officers, clothed with certain discretionary powers. It is made their duty to exercise proper diligence in keeping the roads in good repair (Revised Statutes 1889, § 7807), and as to how this shall be done is necessarily left to their judgment. They come, then, within the scope of the rule, well established, that public officers, vested with discretionary powers in the performance of certain duties, cannot be held individually liable for their acts, unless willfully, maliciously, and oppressively exercised. *Reed v. Conway*, 20 Mo. 22; *Edwards v. Ferguson*, 73 Mo. 686. They cannot be individually held for mere mistakes in judgment. They are not liable so long as they honestly and in good faith perform the work intrusted to them. The injury must be maliciously and willfully committed; and by willful, says Judge Ryland in *Reed v. Conway*, supra, is meant "contrary to a man's own conviction."'"

It is our view that the members of "The Missouri State Poultry Association" are public officers invested with discretionary powers in performance of their duties and cannot be held to personal liability for acts in the performance of their duties not maliciously done.

CONCLUSION

It is the opinion of this office that:

Mr. Charles W. McElyea, Director

1. "The Missouri State Poultry Association" has authority to publish and make available to the public the results of their experiments with poultry in this state.

2. "The Missouri State Poultry Association" members in the performance of their duties are not personally liable for acts not maliciously done.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

June 16, 1971

OPINION LETTER NO. 330
Answer by Letter - Wieler



Mr. William Wright, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wright:

This is in response to your request for an opinion concerning the qualification of an individual for a liquor license where said individual was convicted and sentenced to prison for a felony and then placed on judicial probation for a period of years, culminating in a complete discharge by the court at the end of said period.

As you point out in your letter, this office has already ruled that a pardon does not remove the fact of a conviction, but goes only to the restoration of civil rights and forgiveness of punishment. See Opinion No. 13, issued May 16, 1946, to the Honorable Edmund Burke and Opinion No. 266, issued May 15, 1970, to the Honorable Harry Wiggins (copies enclosed). We have found no Missouri cases applying this concept to a situation involving judicial probation and discharge rather than pardon, but feel that the result would be the same. In any event, discharge by the court does not expunge the record of conviction and sentence.

However, such a conviction of an individual for an offense not related to the liquor laws would not render him automatically ineligible to receive a liquor license. In earlier opinions, we have held that such a conviction renders a person ineligible to receive a license under Section 311.060, RSMo 1969, only where the facts and circumstances surrounding the conviction enable the Supervisor to determine that the person involved is a person of bad moral

Mr. William Wright

character. See Opinion No. 13, issued February 5, 1954, to the Honorable C. M. Buford and Opinion No. 439, issued October 30, 1969, to the Honorable Harry Wiggins (copies enclosed).

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 13
5-16-46, Burke

Op. No. 266
5-15-70, Wiggins

Op. No. 13
2-5-54, Buford

Op. No. 439
10-30-69, Wiggins

AIR CONSERVATION COMMISSION: 1. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to adopt emission control regulations, including limitations on the content of fuels, which will attain and maintain national air quality standards, if the state standards are the same or more stringent. 2. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, and the Constitution of Missouri to enforce without delay the provisions of Chapter 203, RSMo 1969, and standards, rules, and regulations promulgated thereunder, through administrative procedures and injunctive relief. 3. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to abate pollutant emissions on an emergency basis comparable to that available under 42 U.S.C.A., Section 1857d(k). 4. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to provide for the equivalent of a construction permit system by promulgating regulations to require the submission of plans and specifications for approval before any person may construct any facility which will cause air pollution, but that the Commission has no such authority regarding an equivalent permit system for the operation of existing facilities which are the source of air pollution. 5. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, necessary to inspect, conduct tests, and obtain information, including the authority to require record keeping, to determine compliance with emission control regulations. 6. The Missouri Air Conservation Commission does not have any specific authority to require the installation of emission monitoring devices, but does have the authority to require reports from sources of air pollution relating to rate, period of emission and composition of effluent, and to make such information available to the public, unless any such information is "confidential" as defined by Section 203.050.4, RSMo 1969. 7. The State of Missouri has the authority to inspect for "air pollution control devices" which may be installed on motor vehicles as a requirement to comply with applicable emission regulations, but whether such regulations and inspections would accomplish the purpose of "enforcing compliance with applicable emission standards" which are federal standards, and whether the preemption provision of 42 U.S.C.A., Section 1857f-6a, has been complied with are questions that only the appropriate federal officials can answer. 8. All the authorities found in questions 1 through 7 have state-wide application.

OPINION NO. 331

November 15, 1971

H. D. Shell, P.E.
Acting Executive Secretary
Air Conservation Commission
P. O. Box 1062
Jefferson City, Missouri 65101



Dear Mr. Shell:

H. D. Shell, P.E.

This is in reply to your request for an official opinion of this office as to whether the Missouri Air Conservation Law, Chapter 203, RSMo 1969, or any other Missouri statutes contain the "Required State Legal Authority" inquired about by the administrator of the Federal Environmental Protection Agency. There are seven specific questions which we will answer in the order asked.

1.

Does the state have the authority to adopt emission standards and limitations and any other measures necessary (e.g., limitations on the sulfur content of fuels) for attainment and maintenance of national air quality standards?

It is our opinion that the state, through the Missouri Air Conservation, has such authority. Section 203.050, RSMo 1969, provides in part, as follows:

"1. In addition to any other powers vested in it by law the commission shall have the following powers:

(1) Adopt, promulgate, amend and repeal rules and regulations consistent with the general intent and purposes of this chapter and in accordance with the provisions of section 203.070, including but not limited to:

(a) Regulation of use of equipment known to be a source of air contamination; and

(b) Establishment of maximum quantities of air contaminants that may be emitted from any air contaminant source;

(2) After holding public hearings in accordance with section 203.070, establish areas of the state and prescribe air quality standards for such areas giving due recognition to variations, if any, in the characteristics of different areas of the state which may be deemed by the commission to be relevant;"

Thus, the Commission first designates areas of the state, then prescribes air quality standards for such area, and finally promulgates emission control regulations which are maximum quantities of air contaminants that may be emitted from any source.

The Commission, therefore, has the necessary power through the promulgation of emission control regulations to attain and maintain

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air quality standards. If the state air quality standards are the same or more stringent than the national standards, then any emission regulations necessary to attain and maintain the state standards would also attain and maintain the national standards.

In addition to the general question concerning the power to adopt emission control regulations, special reference is made to limitations on the sulfur content of coal. An example of this is found in Regulation X, "RESTRICTION OF EMISSIONS OF SULFUR DIOXIDE FROM USE OF FUEL" of the Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area, adopted by the Commission in 1967. The purpose of Regulation X is to limit the emission of sulfur dioxide from certain fuel burning installations. There are two general approaches in Regulation X.

One is typified by subsection B of Regulation X, which reads in part as follows:

"1. After three (3) years from effective date of this regulation, no persons shall cause or permit the emission of sulfur dioxide to the atmosphere from any fuel burning installation with a capacity of 2,000 million or more British Thermal Units per hour in an amount greater than 2.3 pounds of sulfur dioxide per million British Thermal Units of heat input to the installation."

The other is typified by subsection C of Regulation X, which reads in part as follows:

"1. During the months of December, 1968 and January, 1969 no person shall burn or permit the burning of any coal containing more than 2.0 percent sulfur or of any fuel oil containing more than 2.0 percent sulfur, in any fuel burning installation having a capacity of less than 2,000 million British Thermal Units per hour."

It is readily seen by reading Regulation X that a limitation on the sulfur content of coal is an indirect regulation on the emission of sulfur dioxide, and such was the intent of Regulation X.

Therefore, it is our opinion that limitations on the sulfur content of coal are authorized by Section 203.050, RSMo.

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2.

Does the state have the authority to enforce without delay applicable laws, regulations, and standards, with appropriate sanctions including authority to seek injunctive relief?

The Missouri Air Conservation Commission as discussed in question 1 administers Chapter 203, RSMo, the Missouri Air Conservation Law, and accomplishes the intent and purpose of the law by the adoption of air quality standards and emission control regulations. Section 203.050, RSMo.

The law and standards and rules and regulations are enforced by the Commission and the Executive Secretary first by administrative procedures, Section 203.080, RSMo 1969; and ultimately by suits for injunction and penalties, Section 203.160, RSMo 1969.

Under Section 203.080, RSMo, if attempts at compliance by conference, conciliation, and persuasion fail to eliminate the violation, then the Executive Secretary may either issue an abatement order or file a complaint with the Commission which is then set for hearing before the Commission. If an abatement order is issued, an appeal may be taken to the Commission and a hearing shall be set at a time not less than thirty days after the request. If an order of the Executive Secretary is not appealed from, it is then a final order enforceable by Section 203.160, RSMo.

After any abatement hearing the Commission:

" . . . may sustain, reverse, or modify the executive secretary's order, or make such other order as the commission deems appropriate under the circumstances. . . ." Section 203.080.3, RSMo

If a violation is found:

" . . . the final order or determination shall fix a time, which shall be reasonable under all the circumstances and which may be extended by the commission from time to time, during which the person shall be required to take such measures as may be necessary to prevent the violation and to give periodic progress reports thereon." Section 203.080.6, RSMo

Any final order of the Commission is then subject to judicial review pursuant to Chapter 536, RSMo 1969, the Administrative Procedure Act. Section 203.130, RSMo 1969.

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If any final order of the Executive Secretary or the Commission is being violated and the order is not then subject to judicial review, the Commission may cause to have instituted a suit for injunctive relief and/or penalties up to two hundred dollars per day the violation continues. Section 203.160, RSMo. In such a suit for injunctive relief, brought by the Attorney General, at the request of the Commission, in the name of the people of the State of Missouri, a temporary restraining order and temporary injunction may be asked for and obtained as well as a permanent injunction.

Such a statutory scheme for enforcement of standards, rules, and regulations of an administrative agency such as the Missouri Air Conservation Commission is in keeping with the due process provision of the Missouri Constitution, Article I, Section 10, and also complies with Article V, Section 22, which reads as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

Of course, in cases of emergency, where there have been violations of any standard, rule or regulation, the Executive Secretary with the written approval of the Governor, may order immediate compliance. Section 203.090, RSMo 1969. Upon issuance of such an order, the Commission shall hold a hearing within twenty-four hours and within twenty-four hours after the hearing shall affirm, modify or set aside the order of the Executive Secretary.

Therefore, it is our opinion that the state, through the Missouri Air Conservation Commission, has the authority under Chapter 203, RSMo, and the Constitution of Missouri to enforce without delay the provisions of Chapter 203, RSMo, and standards, rules, and regulations promulgated thereunder, through administrative procedures and injunctive relief.

3.

Does the state have the authority to abate pollutant emissions on an emergency basis to prevent substantial endangerment to public

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health, i.e., authority comparable to that available to the Environmental Protection Agency under Section 303 of the Clean Air Act as amended?

The Section 303 referred to is now found as 42 U.S.C.A., Section 1857d (k) and reads as follows:

"(k) Notwithstanding any other provision of this section, the Secretary, upon receipt of evidence that a particular pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and finding that appropriate State or local authorities have not acted to abate such sources, may request the Attorney General to bring suit on behalf of the United States in the appropriate United States district court to immediately enjoin any contributor to the alleged pollution to stop the emission of contaminants causing such pollution or to take such other action as may be necessary."

This provision then allows the appropriate federal officials to seek, without going through any administrative procedure provided elsewhere in the federal Clean Air Law, injunctive relief against any specific source or sources presenting imminent and substantial endangerment to the health of persons. By providing for injunctive relief any suit brought would necessarily be brought against specific named defendants.

There is a comparable provision in the Missouri Air Conservation Law, Section 203.090, RSMo, which reads as follows:

"Notwithstanding the provisions of section 203.080 or any other provisions of law to the contrary and without necessity of prior administrative procedures or hearings or at any time during the administrative proceedings where the proceedings have been commenced, if the executive secretary after investigation is of the opinion that any person is discharging or causing to be discharged into the atmosphere, directly or indirectly, any air contaminant in violation of commission regulations and the executive secretary determines that the discharge creates an emergency which requires immediate action to protect the public health, safety, or welfare and that it

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therefore appears to be prejudicial to the interests of the people of the state to delay action, the executive secretary, with the written approval of the governor, shall order the person in writing to discontinue immediately the discharge of the contaminants into the atmosphere whereupon the person shall immediately discontinue the discharge. Upon issuance of any such order the commission shall fix a time and place for a hearing to be held before the commission not later than twenty-four hours after the issuance of the order to investigate and determine the factors causing or contributing to the emergency conditions. A true copy of any such order shall be served upon persons whose interests are directly prejudiced thereby in the same manner as a summons in a civil action may be served. All persons whose interests are prejudiced or affected in any manner by any such order shall have the right to appear in person or by counsel at the hearing and to present evidence relevant to the subject of the hearings. Within twenty-four hours after completion of the hearing the commission shall affirm, modify or set aside the order of the executive secretary or make such other orders as the commission deems appropriate under the circumstances in accordance and consistent with the evidence adduced and shall notify all persons appearing in person or by counsel of its determination in writing by certified or registered mail."

This provision also provides for immediate action in emergency cases to protect the health and welfare of persons, and the state provision is quite similar as the federal provision with only two apparent differences.

The first is that the federal act refers to a "source or combination of sources" as the target of enforcement, where the state provision directs its language toward any person causing pollution. The difference is one of choice of language only for the practical effect of Section 203.090, RSMo, is that the Executive Secretary shall act against any person or persons who are the source or causing the source of pollution.

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The other difference is that in the federal act the administrator, after finding an emergency situation and that the state or local authority has failed to act, may request an injunction suit where in Section 203.090, RSMo, the administrator, after finding an emergency condition and receiving approval of the Governor, shall order the pollution source to immediately discontinue discharge. The Commission then must hold a hearing within twenty-four hours and must act within another twenty-four hours.

Thus, in the state law once the necessary conditions are found, the administrator must take action where the federal administrator has the discretion to take or not take enforcement action. Also, the order and hearing before the Commission allows for immediate discontinuance of the discharge. In this respect the state law appears to be stronger from an enforcement standpoint.

However, under the state law if an injunction suit is necessary to ultimately enforce the order as provided in Section 203.160, RSMo, such injunction suit would appear to come after judicial review as provided for in Section 203.130, RSMo, where the federal administrator may seek immediate injunctive relief.

As a practical matter, however, there may or may not be any real difference depending on each specific case. This is because under the federal act if the administrator seeks injunctive relief the United States Attorney General will undoubtedly ask for the immediate relief of a temporary restraining order and temporary injunction, since the situation is supposedly an emergency. It is then discretionary for the United States District Court to issue or deny the temporary restraining order, and it will be up to the federal officials to show the emergency. If neither the temporary restraining nor the temporary injunction is issued, then there will be the necessary period of time for filing pleadings, etc., before the case will be finally disposed of, and, of course, the case could ultimately be lost.

Now, if the State Commission issues an order, it can be appealed pursuant to the provisions of Chapter 536, RSMo, the Administrative Procedure Act. Section 203.130, RSMo.

The appeal is to the appropriate circuit court of Missouri, and Section 536.120, RSMo 1969, provides:

"Pending the filing and final disposition of proceedings for review under sections 536.100 to 536.140, the agency may stay the enforcement of its order and may temporarily grant or extend relief denied or withheld. Any

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court in which such proceedings for review may be pending may issue all necessary and appropriate process to stay or require the agency to stay the enforcement of its order or temporarily to grant or extend or require the agency temporarily to grant or extend relief denied or withheld, pending the final disposition of such proceedings for review. Such stay or other temporary relief by a reviewing court may be conditioned upon such terms as shall appear to the court to be proper. No such stay or temporary relief shall be granted by a reviewing court without notice, except in cases of threatened irreparable injury; and when in any case a stay or other temporary relief is granted without notice the court shall then make an order, of which due notice shall be given, setting the matter down for hearing as promptly as possible on the question whether such stay or other temporary relief shall be continued in effect. No such stay or other temporary relief shall be granted or continued unless the court is satisfied that the public interest will not be prejudiced thereby."

Thus, a stay of the Commission's order is discretionary; and the court could deny a request for a stay of the Commission's order. We assume the circuit court would take into account the same considerations as the United States District Court.

There is the problem of enforcing the order if the stay is denied in view of the language in Section 203.160, RSMo, that the Commission can seek injunctive relief to enforce any order "not then the subject of judicial review" since the order is of course in the process of judicial review. Such a literal interpretation would make the emergency provision virtually meaningless and, of course, it cannot be said that the legislature intended a useless or absurd law incapable of being enforced. *City of Joplin v. Joplin Water Works Company*, 386 S.W.2d 369 (Mo. 1965).

Section 203.160, RSMo, should therefore be read together with Section 536.120, RSMo, and in doing so, it is our opinion that in order to make a denial of the stay and enforcement of the emergency section meaningful the reviewing court has the authority on application to issue an appropriate order to enforce the Commission's order pending review.

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It is our opinion, therefore, that the Commission has the authority to abate pollutant emissions on an emergency basis comparable to that available under 42 U.S.C.A., Section 1857d (k).

4.

Does the state have authority to establish and operate a state-wide system under which permits would be required for the construction and operation of new stationary sources of air pollution and the construction and operation of modifications to existing sources, including authority to prevent such construction, modification, or operation, and any other necessary land use control authority.

It is not entirely clear from the question presented by the federal officials, nor from the federal Clean Air Law, exactly what is meant by a permit system. Even more vague is what is meant by "any other necessary land use control authority."

There are no specific provisions in Chapter 203, RSMo, providing for a "permit system" as for example there is in the Missouri Water Pollution Law. Section 204.030, RSMo 1969. At least the word permit is not used.

However, there are several provisions in Chapter 203, RSMo, providing for submission to the Executive Secretary for approval of air pollution sources and somewhat the same result as a "permit system" may be reached.

Section 203.050, RSMo, provides in part:

"1. In addition to any other powers vested in it by law the commission shall have the following powers:

* * *

(b) Require submission to the executive secretary for approval of plans and specifications for any article, machine, equipment, device, or other contrivance specified by regulation the use of which may cause or control the issuance of air contaminants; but any person responsible for complying with the standards established under this chapter shall determine, unless found by the executive secretary to be inadequate, the means, methods, processes, equipment and operation to meet the established standards. Before adopting regulations referred

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to in this subsection, a public hearing, shall be held in accordance with section 203.070;"

Thus, the commission by regulation may require that new or existing sources must apply to the Executive Secretary for approval of plans and specifications for facilities which may "cause or control" air contaminants. This power is meaningless unless it supposes that until approval is given the person required to submit any plans and specifications cannot proceed with carrying out such plans and specifications. In our opinion this means that no person subject to such regulations can construct any facility proposed by the plans and specifications. It naturally follows that if such person cannot construct such facilities then he will also be unable to operate such facilities.

However, it is our further opinion that the Commission has no such powers of requiring submission for approval the operation of existing facilities which are the source of air pollution. Such existing facilities which are not in compliance with emission control regulations are, of course, subject to enforcement as discussed in question 2 where we concluded there was authority to enforce without delay applicable emission control regulations.

As to the power to require submission of plans and specifications, there must necessarily be provisions to enforce this power in order to make it a meaningful power.

Section 203.060, RSMo 1969, sets out various powers and duties including among others the following:

"(4) The executive secretary shall receive and act upon reports, plans, and specifications submitted under rules and regulations promulgated by the commission. Any person aggrieved by any action of the executive secretary under this provision shall be entitled to a hearing before the commission as provided in section 203.080. The commission may sustain, reverse, or modify any action of the executive secretary taken under this provision, or make such other order as the commission shall deem appropriate under the circumstances;"

Under this section the Executive Secretary would review submitted plans and specifications; and if they were in order and met the appropriate regulations, his action would be to approve such plans and specifications, and the applicant could then proceed to construct the specified facilities.

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If the Executive Secretary determined any submitted plans and specifications were not in order and did not meet the appropriate regulations, he would disapprove such plans and specifications. The applicant then has the right to appeal to the Commission. If the Commission after hearing also disapproves of the plans and specifications, the applicant could then appeal to the courts for review pursuant to Section 203.130, RSMo.

As with the discussion in questions 2 and 3, the Commission would have the right to enforce any such order of disapproval by seeking injunctive relief. Section 203.160, RSMo.

Therefore, it is our opinion that although a "permit system" as such could be provided for in a more specific and complete way, there is the equivalent of a permit system provided for when the Commission may by regulation require submission of plans and specifications for approval before constructing any facility which will cause air pollution.

5.

Does the state have the authority to obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require record keeping and to make inspections and conduct tests of air pollution sources?

It is our opinion that the state has such authority under the following two powers given to the Commission under Section 203.050, RSMo, reading in part as follows:

"1. In addition to any other powers vested in it by law the commission shall have the following powers:

* * *

(3)(a) To require persons engaged in operations which result in air pollution to file reports containing information relating to rate, period of emission and composition of effluent;

* * *

(8) Authorize any employee of the commission to enter at all reasonable times and upon reasonable notice in or upon any private or public property for the purpose of inspection and investigating any condition which the commission

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shall have cause to believe to be an air contaminant source. No person shall refuse entry or access, requested for purposes of inspection under this provision, to an authorized officer, employee or agent of the commission who presents appropriate credentials, nor obstructs or hamper the officer, employee or agent in carrying out the inspection;"

The language quoted is self-explanatory and provides the authority necessary to inspect, conduct tests, and obtain information to determine compliance with emission control regulations. This includes the authority to require record keeping.

6.

Does the state have the authority to require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the state on the nature and amounts of emission from such stationary sources; also, authority to make such data available to the public as reported and as correlated with any applicable emission standards?

The only provision of Missouri law that is possibly applicable is again in Section 203.050, RSMo, granting the Commission the power to:

"1. In addition to any other powers vested in it by law the commission shall have the following powers:

* * *

(3)(a) To require persons engaged in operations which result in air pollution to file reports containing information relating to rate, period of emission and composition of effluent;"

It could be said that a person responsible for a source of pollution may have to install certain monitoring equipment in order to provide the information required by the quoted provision. However, the Commission cannot require that such information be furnished as a result of any specific monitoring device. Therefore, it is our opinion that the state does not have any specific authority to require the installation of emission monitoring devices.

As stated in question 5, the state does have the power to require the necessary reports.

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As to the authority to make such data available to the public, it is our opinion that the Commission or staff may make such information available, except as prohibited by Section 203.050.4, RSMo, which reads as follows:

"Any information relating to secret processes or methods of manufacture or production discovered through any communication required under this section shall be kept confidential."

Any commissioner or employee willfully disclosing information that qualifies as confidential is subject to forfeiture of office and conviction of a felony. Sections 203.100.5 and 203.160.2, RSMo 1969.

We do not rule on any specific situations that may arise but only state that it would appear that in most situations the information that is furnished pursuant to Section 203.050.1(3)(a), RSMo, would most likely not qualify as confidential under Section 203.050.4, RSMo. That is, for most sources of pollution the information relating to "rate, period of emission and composition of effluent" would not constitute "information relating to secret processes or methods of manufacture or production."

Therefore, the answer generally is that the state does have the authority to make such information available.

7.

Does the state have the authority to carry out a program of inspection and testing of motor vehicles to enforce compliance with applicable emission standards when necessary and practicable, and other authority necessary to control transportation?

Although it is not clearly stated, it is obvious that the "applicable emission standards" referred to are those required by the federal Clean Air Act. 42 U.S.C.A., Section 1857. This is because the federal act preempts the area of emission standards, or more correctly regulations, and thus the federal regulations would be the only regulations that would apply in Missouri. 42 U.S.C.A., Section 1857f-6a. This section reads in part as follows:

"(a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this subchapter. No State shall require certification, inspection, or any other approval relating to the control of

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emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

* * *

"(c) Nothing in this subchapter shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."

We find no provision in Chapter 203, RSMo, or any other state law that per se authorizes or empowers the state or any state agency to enforce the federal act.

However, there is the general power for the Commission to adopt and enforce standards and regulations to control air pollution. See questions 1 and 2. In addition, there is the Motor Vehicle Safety Inspection Law, Sections 307.350 through 307.390, RSMo 1969. This law provides for an annual inspection of certain motor vehicle equipment as a prerequisite to registration.

Included in the requirements for inspection is "air pollution control devices . . . required by the state." Section 307.360.1, RSMo. The Superintendent of the Missouri State Highway Patrol administers this program and established standards and procedures to be followed in making inspections. Section 307.360.2, RSMo.

However, the actual requirements for the various equipment subject to inspection is determined by other provisions of law. In the case of brakes, lighting equipment, etc., the requirements are provided by various provisions of Chapter 307, RSMo 1969.

In the case of "air pollution control devices," the requirement would have to be provided by regulation of the Commission under Chapter 203, RSMo. The Commission has adopted such a regulation known as "Regulation S-I, Auto Exhaust Emission Controls for the State of Missouri."

Thus, the State of Missouri has the authority to inspect for "air pollution control devices" which may be installed on motor vehicles as a requirement to comply with applicable emission regulations. Whether any such regulations and inspections would accomplish the purpose of "enforcing compliance with applicable emission standards" which are federal standards, and whether the preemption clause has been complied with are questions that only the appropriate federal officials can answer.

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Finally, the question is asked as to whether there is authority necessary to "control transportation." Since it is not plain what is meant by "control transportation," we cannot give you an exact answer.

All we can do is to advise that we do not find anywhere in Chapter 203, RSMo, or any other Missouri statute the specific authority to "control transportation" for air pollution control purposes.

8.

Are the seven authorities discussed above applicable to the entire state?

The question was also asked by the federal administrator in relation to every one of the seven questions on specific authorities whether such authorities are applicable to the entire state. Rather than repeat the same discussion and citations with each of the seven questions, it is more appropriate to approach this as a separate question.

The general statutory scheme of Chapter 203, RSMo, is that the Commission has state-wide authority and can designate areas of the state and adopt and enforce standards and regulations throughout the state, giving such recognition to differences in the areas as the Commission may deem necessary. Section 203.050, RSMo.

However, enforcement may be carried out by local political subdivisions of the state, so long as the local regulations and enforcement of those regulations are consistent with the state regulations and requirements of enforcement. Sections 203.140 and 203.150, RSMo 1969.

When such is the case the Commission may grant the political subdivision an exemption from state enforcement with supervisory control by the Commission. Thus, there is really state-wide control. Therefore, it is our opinion that there is state-wide application of all those authorities that we have said the state has in our discussions in questions 1, 2, 3, 4, 5, and 6. And, as to the discussion in question 7, such programs are enforced statewide by the Superintendent of the Missouri Highway Patrol pursuant to the Motor Vehicle Safety Inspection Law.

CONCLUSION

It is the opinion of this office that:

1. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to adopt emission control regulations,

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including limitations on the content of fuels, which will attain and maintain national air quality standards, if the state standards are the same or more stringent.

2. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, and the Constitution of Missouri to enforce without delay the provisions of Chapter 203, RSMo 1969, and standards, rules, and regulations promulgated thereunder, through administrative procedures and injunctive relief.

3. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to abate pollutant emissions on an emergency basis comparable to that available under 42 U.S.C.A., Section 1857d(k).

4. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, to provide for the equivalent of a construction permit system by promulgating regulations to require the submission of plans and specifications for approval before any person may construct any facility which will cause air pollution, but that the Commission has no such authority regarding an equivalent permit system for the operation of existing facilities which are the source of air pollution.

5. The Missouri Air Conservation Commission has the authority under Chapter 203, RSMo 1969, necessary to inspect, conduct tests, and obtain information, including the authority to require record keeping, to determine compliance with emission control regulations.

6. The Missouri Air Conservation Commission does not have any specific authority to require the installation of emission monitoring devices, but does have the authority to require reports from sources of air pollution relating to rate, period of emission and composition of effluent, and to make such information available to the public, unless any such information is "confidential" as defined by Section 203.050.4, RSMo 1969.

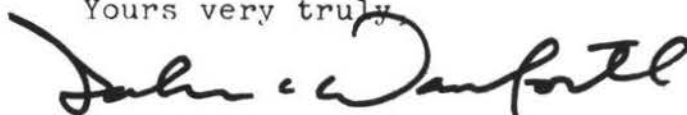
7. The State of Missouri has the authority to inspect for "air pollution control devices" which may be installed on motor vehicles as a requirement to comply with applicable emission regulations, but whether such regulations and inspections would accomplish the purpose of "enforcing compliance with applicable emission standards" which are federal standards, and whether the preemption provision of 42 U.S.C.A., Section 1857f-6a, has been complied with are questions that only the appropriate federal officials can answer.

8. All the authorities found in questions 1 through 7 have state-wide application.

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 23, 1971

OPINION LETTER NO. 332

Honorable Richard M. Webster
Missouri Senate, District 32
112 North Webb Street
Webb City, Missouri 64870



Dear Senator Webster:

This letter is in answer to your question in which you ask whether Joplin, a Constitutional Charter city, must or can abolish a Land Clearance For Redevelopment Authority established under the provisions of Sections 99.300, RSMo 1969, et seq after a majority vote of the people against the continuance of the Authority.

In our view, the holding of the Kansas City Court of Appeals in Anderson v. Smith, 377 S.W.2d 554 (1964) answers your question. We quote at length from that opinion beginning at l.c. 556:

"Columbia, Missouri is a municipal corporation with a population which has always been substantially less than 75,000. Pursuant to Section 99.320(6) of the mentioned statute the City Council of Columbia on April 23, 1956, enacted Ordinance No. 485 finding that one or more blighted or insanitary areas exist in Columbia and that the redevelopment thereof is necessary in the interest of the health, safety, morals or welfare of the city, and in effect accepted the provisions of the Land Clearance For Redevelopment Authority Law subject to a vote of the people thereon. Ordinance No. 485 provided for a special election to be held on May 29, 1956, to submit to the electors of Columbia the proposition of whether they accept the provisions of the Law, and 'approving the exercise of the powers, duties, and functions of said law by a land clearance for redevelopment authority * * * and establishing such authority by finding that one or more blighted or insanitary areas as defined in

said law exist in the City of Columbia, and that the redevelopment of such area or areas is necessary in the interest of the health, safety, morals and welfare of the residents of said City.'

"The special election was held on May 29, 1956, and the proposition passed as submitted pursuant to the ordinance."

The Court further stated at l.c. 559-560:

"By the enactment of Sections 99.300 to 99.660, RSMo 1959, V.A.M.S., the General Assembly declared the existence in localities throughout the state of blighted and insanitary areas constituting a serious and growing menace to the public health, safety, morals and welfare of the residents of this state. In the state public interest it declared the necessity for the provisions contained in the Land Clearance For Redevelopment Law and made them automatically applicable to all cities of more than 75,000 population. Cities with less than 75,000 population were given the opportunity (option) of deciding whether or not they desired to accept the provisions of this law. Columbia, by becoming a 'community' thereunder both by action of its city council and by vote of its people accepted this law and thereby became subject to it just as is any city with a population of over 75,000. It is not a question of the people of the community not being given a voice, for it was the people by their vote who recognized that in their community there exists one or more of these blighted and insanitary areas and approved the exercise of powers by the Authority under the provisions of the state statute.

"Having become subject to this state statute how can this, or any municipality subject to it, become free of it? The law was not enacted to effect solely municipal objectives. These were state purposes to be fulfilled by this statute. It is our view that just as with other state laws, it remains applicable to a municipality which has accepted it until the legislature repeals it or unless or until this statute or another properly enacted statute authorizes a municipality to withdraw or provides a means for a municipality to withdraw from its applicability.

Honorable Richard M. Webster

We do not believe it was the intent of the state legislature in enacting the statute in the light of a state need to permit a municipality which has found the local need for it, solely by municipal action to be able to withdraw itself from the provisions of that statute established to cure or better those very conditions causing the need. Cf. State ex rel. Great Falls Housing Authority v. City of Great Falls, 100 Mont. 318, 100 P.2d 915."

We find no laws subsequent to this decision which would affect this holding and therefore conclude that, in the premises, the Land Clearance For Redevelopment Authority cannot be abolished.

Very truly yours,

JOHN C. DANFORTH
Attorney General

OFFICERS:
COMPENSATION:
FIRE PROTECTION DISTRICTS:

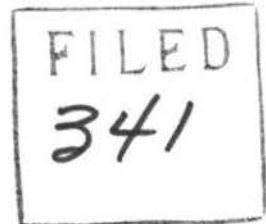
1. Members of the board of directors of a fire protection district are not entitled to receive compensation for attending more than two regularly

called board meetings in any calendar month and this includes a regularly called meeting of the directors of several fire protection districts which have established a consolidated alarm and dispatching service. After September 28, 1971, the effective date of Senate Committee Substitute for House Bill No. 316 of the 76th General Assembly, the members of the board of a fire protection district in a first class county having a charter form of government, may receive compensation for not more than four meetings each calendar month. 2. A member of the board of directors of a fire protection district cannot be employed and paid any additional compensation for services rendered the district in excess of the amount allowed under Section 321.190, RSMo 1969.

OPINION NO. 341

August 18, 1971

Honorable J. Anthony Dill
Representative, District 44
8011 Grandvista Avenue
Affton, Missouri 63123



Dear Representative Dill:

This is in response to your request for an opinion from this office as follows:

"May I respectfully request the opinion of your office regarding the proper interpretation to be given to Section 321.190 of the Revised Statutes referring to fire protection districts.

"Question 1: Board members are entitled to receive compensation for attending not more than two regularly called board meetings in any calendar month. Does a regularly called meeting of the directors of several fire protection districts which have established a consolidated alarm and dispatching system qualify attending directors for compensation from their respective districts?

"Question 2: May the chairman of the board of directors of a fire protection district, who is not the secretary or the treasurer of the

Honorable J. Anthony Dill

board, be paid any additional compensation for services rendered to the district, such as preparing for board meetings, or reviewing existing or proposed legislation, etc.?"

We assume your question concerns fire protection districts located in a first class county having a charter form of government and the fire protection districts involved proceeded under Sections 321.243 and 321.245, RSMo 1969, in establishing joint, central fire and emergency dispatching service. Section 321.190, RSMo 1969, provides for compensation and expenses to be allowed directors of such fire protection districts. It provides as follows:

"Each member of the board shall receive an attendance fee in the amount of twenty-five dollars for attending each regularly called board meeting, but shall not be paid for attending more than two in any calendar month. In addition, the chairman of the board of directors shall receive fifteen dollars for attending each regularly called board meeting, but shall not be paid the additional fee for attending more than two meetings in any calendar month. Each member of the board shall be reimbursed for his actual expenditures in the performance of his duties on behalf of the district. The secretary and the treasurer, if members of the board of directors, may each receive such additional compensation for the performance of their respective duties as secretary and treasurer as the board shall deem reasonable and necessary not to exceed seven hundred fifty dollars per year. The circuit court having jurisdiction over the district shall have power to remove directors or any of them for good cause shown upon a petition, notice and hearing."

Section 321.190, supra, was amended by Senate Committee Substitute for House Bill No. 316 of the 76th General Assembly effective September 28, 1971, by increasing the per diem of members of the fire protection district boards from twenty-five dollars a meeting to thirty dollars and increases the number of monthly meetings in charter first class counties for which the per diem may be claimed from two to four.

You first inquire whether members of a fire protection district are entitled to compensation for attending a joint meeting of the boards of several fire protection districts which have established a consolidated alarm and dispatching system.

Honorable J. Anthony Dill

Section 321.243, RSMo 1969, provides:

"1. Notwithstanding any other provision of law, an additional tax of not to exceed three cents per one hundred dollars of assessed valuation may be levied and collected by any city, town, village, or fire protection district all or part of which is located in a county of the first class having a charter form of government, but all the funds derived from such tax shall be used solely for the purpose of providing a joint, central fire and emergency dispatching service.

"2. The additional tax prescribed by this section shall be levied only when the governing body of the city, town, village, or fire protection district determines that a central fire and emergency dispatching center is available, that the center meets the minimum requirements set by section 321.245, and when the governing body has entered into a contract with the center for fire and emergency dispatching services. The funds from the tax shall be kept separate and apart from all other funds of the city, town, village, or fire protection district, and shall be paid out only on order of the governing body."

Under this statute the funds derived from the special tax can be used only when the governing body of the fire protection district determines that a central fire and emergency dispatching service is available and the governing body of the fire protection district enters into a contract for such service. The statute is silent as to any meetings of the board with other agencies in negotiating or executing the contract so the general principles of law that govern the transaction of business of the fire protection district apply. Members of the board may meet individually, but official business can be transacted only when the members meet as a board. *Carter v. Reynolds County*, 315 Mo. 1233, 288 S.W. 48 (1926). This applies whether the meeting is for the transaction of business of the individual fire protection district or to a business transaction at a joint meeting with another fire protection district or agency. It follows that any business transacted by the board of directors of a fire protection district has to be transacted at an official meeting of the board of the fire protection district under Section 321.190, supra, and this applies if the board meets jointly with the board of another fire protection district or other agency.

Honorable J. Anthony Dill

Since official business can be conducted only at a meeting of a fire protection district board, it follows that a joint meeting of fire protection district boards at which official business is transacted is a meeting of each board and the members are entitled to compensation for attending such a meeting. Such meeting is to be counted in determining the maximum number of meetings for which compensation can be paid to district directors.

Members of the fire protection district board of directors are public officers. Compensation to a public officer is a matter of statute and not of contract; and compensation exists, if it exists at all, solely as a creation of the law and then is incidental to the office. *State ex rel. Evans v. Gordon*, 245 Mo. 12, 27, 149 S.W. 638 (en banc 1912); *Smith v. Pettis County*, 345 Mo. 839, 136 S.W.2d 282 (1940). The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefore is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other further compensation or to any different mode of security. Such statutes are strictly construed against the officer. *Nodaway County v. Kidder*, 129 S.W.2d 857 (Mo. 1939).

It is our opinion the only compensation members of the board of directors of a fire protection district are entitled to receive for the performance of their official duties is the compensation provided for under Section 321.190, supra. This statute sets the compensation to be paid to each member for each regularly called meeting but limits the number of meetings for which compensation is to be paid to two meetings in any calendar month. We find no statute authorizing additional compensation for attending any additional meeting in the performance of their duties in attending joint meetings of the several boards as may be necessary under Sections 321.243 and 321.245, RSMo 1969. It is our opinion that members of the board of directors of each fire protection district are entitled to compensation only as provided by Section 321.190, supra, whether such meeting is a meeting of the board of the individual fire protection districts or whether it is a joint meeting of all the boards of the several fire protection districts.

In answer to your second question whether a member of the board may be paid additional compensation for services he renders the district, it is our opinion he cannot be paid any compensation in addition to the amount allowed under Section 321.190, supra, for any service he may perform for the benefit of the district. In *Nodaway County v. Kidder*, supra, the county court of Nodaway County sued the ex-presiding Judge of the county court to recover money that had been paid him by the county court as an employee of the county under an agreement with the county court that he be paid

Honorable J. Anthony Dill

a stated amount per day for work he performed for the county. The court in holding a county judge was not entitled to receive any compensation for work performed by the county in addition to the statutory amount he was to receive as a member of the court, stated l.c. 61:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N.C. 578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

It is our view that a member of the board of directors of a fire protection district cannot be employed and paid any additional compensation for services rendered the district in excess of that as provided under the statute.

CONCLUSION

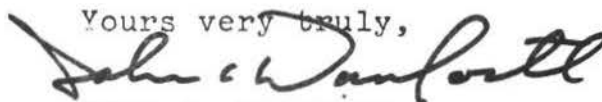
It is the opinion of this office that:

1. Members of the board of directors of a fire protection district are not entitled to receive compensation for attending more than two regularly called board meetings in any calendar month and this includes a regularly called meeting of the directors of several fire protection districts which have established a consolidated alarm and dispatching service. After September 28, 1971, the effective date of Senate Committee Substitute for House Bill No. 316 of the 76th General Assembly, the members of the board of a fire protection district in a first class county having a charter form of government, may receive compensation for not more than four meetings each calendar month.

2. A member of the board of directors of a fire protection district cannot be employed and paid any additional compensation for services rendered the district in excess of the amount allowed under Section 321.190, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

June 22, 1971

OPINION LETTER NO. 344
Answered by Klaffenbach

Honorable Ronald M. Belt
Missouri House of Representatives
203 E Capitol Building
Jefferson City, Missouri 65101



Dear Representative Belt:

This letter is in answer to your questions concerning water supply districts stated as follows:

"1. Does 'cities' in that statute [Section 247.030] include third class cities and fourth class cities?

"2. Would 247.030 prohibit an established water supply district from first, purchasing an existing city's waterworks system and second, then include that city within its boundaries?"

We are enclosing our Opinion No. 270, dated May 19, 1971, to the Honorable Robert H. Martin, concerning cooperative agreements between such districts and cities which relates to, but does not dispose of your questions.

Section 247.030, RSMo 1969, provides:

"Territory that may be included in a district sought to be incorporated may be wholly within one or in more than one county, may take in school districts or parts thereof, and cities that do not have a waterworks system. The territory however, shall be contiguous, and proceedings to incorporate shall be in the circuit court of the county in which the largest acreage is located. No two districts shall overlap."

Honorable Ronald M. Belt

That section does not limit the classification of cities within the exception and therefore we conclude that all cities, including third and fourth class cities, having a waterworks system are excluded from the district. A recent case in which the exception was noted with respect to a fourth class city is Public Water Supply Dist. No. 7 v. City of Pevely, 437 S.W.2d 108 (St. Louis App. 1969).

In answer to your second question, it is our view that the powers given the districts under Section 247.050, RSMo 1969, are sufficiently broad to authorize the district to acquire the waterworks system of such a city. It is then possible for such a city to be included in the enlarged or extended boundaries of the district under the provisions of Section 247.040, RSMo 1969.

We wish to point out that we are not passing upon the authority of any city to sell its waterworks system as various particular statutory limitations and requirements such as those contained in Sections 91.290, 91.320 and 91.550, RSMo 1969, or elsewhere may be involved in any such determination.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 270
5/19/71, Martin

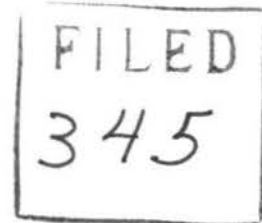
August 2, 1971

OPINION LETTER NO. 345

Answer by letter-

C. A. Blackmar

Honorable Jack J. Schramm
Representative, District 37
7529 Gannon Avenue
University City, Missouri 63130



Dear Representative Schramm:

This letter is in response to your request for an opinion concerning Senate Committee Substitute for House Bill No. 28, passed by the 76th General Assembly and signed by the Governor July 17, 1971, which will become effective on September 28, 1971. The bill repeals Sections 72.080, 72.085, 72.100 and 72.130, RSMo 1969 and enacts five new sections. It provides a procedure by which unincorporated areas may become incorporated. The procedure is for a stated percentage of the electors of the area to petition the county governing body requesting that an election on the question of incorporation be held. If the petitions contain the required number of signatures, the county governing body must then call an election within a specified period of time.

You request an opinion on the question of whether signatures collected before the effective date of the law, September 28, 1971, may be counted for the purpose of determining if a petition requesting an election contains a sufficient number of signatures.

The effective date of the bill is ninety days after the adjournment of the session, Article III, Section 29, Missouri Constitution. The general rule is stated in the case of *Keane v. Cushing*, 15 Mo.App. 96, 99 (1894):

" . . . where a constitutional provision prescribes the date of which an act of the legislature shall take effect, until the arrival of that date, it has no force or validity for any purpose whatever; not even for the purpose of imparting notice of its existence. . . ."

Honorable Jack J. Schramm

In that case the City of St. Louis passed a bill authorizing the letting of a contract for a public works project. The city charter provided that no ordinance was to take effect until ten days after its passage. Another city ordinance requires that notice of the letting of city contracts be published three times in a newspaper. The city published notice with respect to the contract on three occasions, but each occasion was prior to the tenth day after the passage of the ordinance. The court held that the notice given before the ordinance was actually in effect was not sufficient notice under the statute and, therefore, declared the contract to be invalid.

In *City of St. Louis & County of St. Louis v. Alexander*, 23 Mo. 483 (1856), the City and County of St. Louis were authorized by a state statute to subscribe to the capital stock of a railroad company. The statute provided that before the subscription was authorized, the question had to be submitted to a vote of the people at an election. The statute contained no clause as to the time within which it should take effect. That being so, the statute, under the general law then in force, became effective ninety days after its passage. However, the question was submitted to a vote of the people at an election held before the expiration of that time. The vote was in favor of making the subscription. The county court thereupon made the subscription. The court held that, because the election had been held before the statute authorizing the subscription became operative, the subscription was void.

On the basis of those two decisions, we are of the opinion that signatures collected on petitions requesting an election before the effective date of Senate Committee Substitute for House Bill No. 28 of the 76th General Assembly would not be valid for purposes of having an election called to determine whether an area should incorporate.

Yours very truly,

JOHN C. DANFORTH
Attorney General

June 18, 1971

OPINION LETTER NO. 347
Answered by Klaffenbach

Honorable E. J. Cantrell
State Representative, 33rd District
306 Capitol Building
Jefferson City, Missouri 65101



Dear Representative Cantrell:

This letter is in answer to your opinion request in which you ask the following:

"Does the Fiscal Affairs Office have any legal authorization under the Statutes, to authorize the request and approve same, for a transfer of funds appropriated under separate sections of the appropriation bills. As an example, the Department of Welfare requests to transfer funds as appropriated from the Old Age Assistance Program to the program for Aid to Dependent Children that would be appropriated under another section of the appropriation bills. Further, I would request an opinion as to the Fiscal Affairs Office's authorization in authorizing any acceleration of the quarterly allotments for any of the other State Programs."

The Committee on State Fiscal Affairs is organized under Sections 21.470, RSMo 1969, et seq. It is composed of seven

Honorable E. J. Cantrell

members of the senate and seven members of the house of representatives together with the president pro tem of the senate and the speaker of the house of representatives who are ex officio members.

The duties of the committee are set forth in Section 21.500, RSMo 1969, which provides:

"(1) The committee shall provide fiscal research and analysis service for the appropriation and ways and means committees of the two houses of the general assembly, the committee on legislative research, interim committees and commissions and members of the general assembly on matters relating to revenue, taxation, appropriations and the fiscal and financial affairs of the state.

"(2) The committee shall assume the responsibilities relating to fiscal affairs now assigned to the committee on legislative research by subsection 1 of section 23.050, RSMo, and shall cooperate with the committee on legislative research to obtain information on the needs, organization, functioning, efficiency and financial status of any department, division, institution or agency of state government which is supported in whole or in part by revenue of the state; collect and assemble information concerning the revenue and tax resources of the state and upon any fiscal question of statewide interest which may reasonably become subjects of legislative action or consideration.

"(3) In its research and analysis of state fiscal and financial affairs, the committee shall restrict its interest and activities to matters having an application to the fiscal responsibilities of the general assembly and it shall not duplicate or infringe upon the duties of the state auditor or state comptroller.

Honorable E. J. Cantrell

"(4) The committee and its staff may use information and data made available to it by the state auditor and state comptroller and, on written request of the committee, state departments, divisions, institutions and agencies shall provide information and access to their books, accounts, reports, vouchers, correspondence files and all other records and property. The access to such information, records and accounts shall be secondary to their use by the auditor and comptroller in the performance of their official duties, except that the priority of the auditor and comptroller is limited to ten calendar days following a written request for access by the committee."

Subsection 1 of Section 23.050, RSMo, provides:

"(1) The committee may obtain information upon the needs, organization, functioning, efficiency and financial status of any department of state government or of any institution or agency which is supported in whole or in part by revenue of the state; collect and assemble information concerning the revenue of the state and the tax resources of the state and upon questions of statewide interest which may reasonably become subjects of legislative action or of legislative consideration; make available such information as is requested by any member or member-elect of the general assembly."

The clear language of the above sections indicates that the Committee has no authority to authorize a transfer of appropriated funds or to authorize an acceleration of program allotments.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SIDEWALKS:
TAXATION (MOTOR VEHICLE):
CITIES, TOWNS AND VILLAGES:
MOTOR VEHICLE GASOLINE TAX:

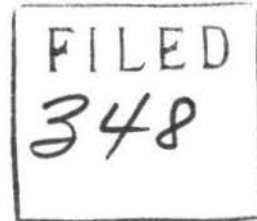
1. The motor vehicle fuel tax funds appropriated to a city under the provisions of Article IV, Section 30(a) of the Missouri Constitution cannot be used to construct or maintain side-

walks. 2. General revenue funds of a city of the fourth class may be used to construct or maintain sidewalks in the city under Section 88.680, RSMo 1969.

OPINION NO. 348

October 19, 1971

Honorable Richard M. Marshall
Representative, District 43
111 South Bemiston
St. Louis, Missouri 63105



Dear Representative Marshall:

This is in response to your request for an opinion as follows:

"We are writing you as State Representative for the district in which the City of Glendale is located to ask that you secure an opinion of the Attorney General for us on a matter which we believe is probably of general interest and concern. If the answer comes back as we fear it might, it might be a matter in which the State laws could be amended.

"The thing we are concerned about is the ability of the City of [sic] use money from general funds or from money paid over to the City from the State Road Fund by St. Louis County for the purpose of repairing sidewalks or of constructing or reconstructing sidewalks. In our City, as well as we are sure in many others, there are sidewalks along main thoroughfares such as Sappington Road and Berry Road, which really do not specifically benefit the immediate property owners, but which are essential for the safety of pedestrians walking along these relatively narrow rights-of-way. It seems to us unreasonable to burden the immediate property owners with the expense of repairing or constructing walks along these main thoroughfares and yet are unable to find the statutory authority to do anything but that. We would appreciate an opinion from the Attorney General as to whether

Honorable Richard M. Marshall

there is any authority authorizing a city of the fourth class to repair or reconstruct sidewalks, either from our general funds or from the State Road Fund."

The city of Glendale is a fourth class city.

We assume the state road funds to which you refer are the funds received from the State Highway Department under Article IV, Section 30(a) of the Constitution of Missouri. This constitutional provision provides for the collection of a fuel tax on fuel used for propelling highway motor vehicles. It provides that the net proceeds of the tax after deducting cost of collection, apportionment, and making refunds shall be apportioned between the counties, cities, and the state as hereinafter provided and shall stand appropriated without legislative action for the following purposes:

"Fifteen per cent of the remaining net proceeds shall be allocated to the various incorporated cities, towns and villages within the state having a population of more than two hundred according to the last preceding federal decennial census, solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law. . . ."

Constitutional provisions are subject to the same rules of construction as others with due regard being given to broader scope and objects of the Constitution. *Wring v. City of Jefferson*, 413 S.W.2d 292 (Mo. banc 1967). In construing constitutional provisions the intent of the instrument is paramount. *State ex rel. Harry L. Hussman Refrigerator & Supply Company v. City of St. Louis*, 319 Mo. 497, 5 S.W.2d 1080 (banc 1928). The intent and purpose of lawmakers is of primary importance to determining true meaning and scope of constitutional provisions. *Graves v. Purcell*, 337 Mo. 574, 85 S.W.2d 543 (banc 1935).

It is our view these funds derived under this constitutional provision stand appropriated to the city only for the construction, reconstruction, maintenance, repair, policing, signing and lighting and treating "roads and streets" subject to such other provisions and restrictions as provided by law. The question presented by you is whether these funds can be used for the construction of sidewalks.

Honorable Richard M. Marshall

This requires the construction or interpretation of the terms "roads and streets" in this constitutional provision. It is our view that a sidewalk does not come within the provisions of this constitutional provision.

In *Quinn v. Graham*, 428 S.W.2d 178 (Spr.Ct.App. 1968) the question was the sufficiency of a notice given to a city of the location of an accident as happening on a "sidewalk" when the accident actually happened on a "parkway" between the sidewalk and the curb. In discussing the sufficiency of this notice, the court stated l.c. 185:

"While 'street,' in a legal sense, may encompass all parts of the way, it is a matter of common knowledge, as displayed by all the parties and witnesses in this cause, that there are definite and separate areas of the entire easement devoted to different uses. The legislature recognizes the distinction by providing different systems for financing the construction and maintenance of each segment. V.A.M.S. §§ 88.507-88.530 and 88.870-88.900. The area between the curbs is generally thought of as being primarily designed for vehicular traffic. A parkway consists of that particular area of the way lying between the roadway and sidewalk or between the curb and sidewalk, while 'sidewalk' is defined as 'a walk for foot passengers usually at the side of the street or roadway; a foot pavement.' Webster's Third New International Dictionary, 1966, p. 2113; *Rentfro v. Weelock Bros.*, Mo.App., 364 S.W.2d 55, 57(1); *Wendegatz v. Kansas City Gas Co.*, Mo.App., 217 S.W.2d 269, 271(2, 3); 31 Words and Phrases, Parkway, pp. 159-161; 10 McQuillin--Municipal Corporations, 1966 Revised Vol., § 30.03, pp. 620-624, § 30.05, pp. 627-628, § 30.11, pp. 641-645. Therefore, when the notice designated 'the sidewalk' as the 'place where,' persons of ordinary intelligence would direct their attention to an inspection of the walks designed for foot passengers in an effort to locate the site and cause of the alleged fall. The proof belies the notice, for the accident did not occur on the sidewalk but 'took place * * * in * * * the parkway between the curb line and the sidewalk * * * in the dirt,' where plaintiff 'knew the parkway was not sidewalk.'"

Honorable Richard M. Marshall

In a broad sense the terms "roads or streets" may include that portion of the right-of-way used for vehicular and pedestrian traffic. However, the legislature has, in providing for the construction and maintenance of streets and sidewalks, considered a street and a sidewalk as separate and distinct objects or projects. Sections 88.680, 88.703, 88.700, 88.707, 88.710, RSMo 1969. In all these statutes the legislature has considered matters relating to the construction and maintenance of sidewalks as separate and distinct from the maintenance and construction of streets.

We believe the terms "roads and streets" as used in this constitutional provision should receive the same interpretation or construction as the statute governing the same subject matter, and that it was not intended by this constitutional provision to provide funds for the construction or maintenance of sidewalks.

You also inquire whether general revenue funds of a fourth class city may be used to build sidewalks.

Section 88.680, RSMo 1969, provides:

"The cost of paving, macadamizing, guttering and curbing (where such curb is set out into the street beyond the sidewalks) all streets, avenues, alleys and other highways, or any part thereof or any connection therewith, and repairing the same, and for doing all excavating and grading necessary for the same, after said streets, avenues, alleys and other highways, or parts thereof or connections therewith, have been first brought to grade, as provided in section 88.670, shall be levied as a special assessment upon all lots and pieces of grounds upon either side of such street, avenue, alley or other highway, or part thereof or connection therewith, abutting thereon, along the distance improved, in proportion to the front foot; provided, that the cost of paving, macadamizing, curbing and guttering any street, avenue, alley or highway, or any part thereof, and the cost of repairing and cleaning of the same and of making and repairing sidewalks may be paid out of the general revenue fund of the city or other funds which the city may have for such purposes, if the board of aldermen so desires, in which case the proceedings of the city for such improvements shall specify that payment will be made out of the general revenue funds or other funds in whole or in part." (Emphasis supplied)

Honorable Richard M. Marshall

It is our opinion that under this section general revenue funds of a fourth class city or other funds which the city may have for such purposes may be used for making and repairing sidewalks if the board of aldermen of the city so desires, provided the proceedings of the city for such improvements specify that payment shall be made out of the general revenue funds or other funds in whole or in part. However, this does not include any funds received by the city under the provisions of the above constitutional provision.

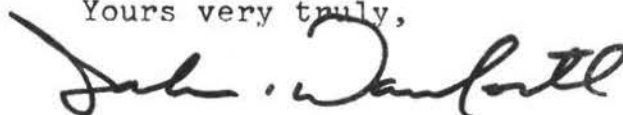
CONCLUSION

It is the opinion of this office that:

1. The motor vehicle fuel tax funds appropriated to a city under the provisions of Article IV, Section 30(a) of the Missouri Constitution cannot be used to construct or maintain sidewalks.
2. General revenue funds of a city of the fourth class may be used to construct or maintain sidewalks in the city under Section 88.680, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney general

June 22, 1971

OPINION LETTER NO. 349
Answer by letter-Wood

Mr. Gene Sally, Director
Department of Community Affairs
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Sally:

You have requested my legal opinion on the responsibility and authority of the Department of Community Affairs to participate as the designated state agency in the Community Development Training Program (Part I, Title VIII, Housing Act of 1964, P. L. 88-560, 20 U.S.C. Sections 801, et seq.).

The declared purpose of the federal law is to provide financial assistance to the states in:

"(1) organizing, initiating, developing, or expanding programs to provide special training in skills needed for economic and efficient community development to those technical, professional, and other persons with the capacity to master and employ such skills; and who are, or are training to be, employed by a governmental or public body which has responsibilities for community development, or by a private non-profit organization which is conducting or has responsibility for housing and community development programs; and

"(2) supporting State and local research that is needed in connection with housing programs and needs, public improvement programming, code problems, efficient land use, urban transportation, and similar community development problems, and collecting, collating, and publishing statistics and information relating

Mr. Gene Sally

to such research. . . ." (20 U.S.C., Section 802(a) (1) and (2))

As a condition of participation, a state must designate to the Secretary of Housing and Urban Development,

". . . an officer or agency of the State government who has responsibility and authority for the administration of a statewide research and training program as the officer or agency with responsibility and authority for the execution of the State program under this part; . . ."
(20 U.S.C., Section 802(4))

The Secretary of Housing and Urban Development has authorized the Governor of any state to make the designation referred to in the law.

By Executive Order of February 14, 1968, Warren E. Hearnes, Governor of the State of Missouri, officially designated the Department of Community Affairs as the participating state agency for purposes of the Community Development Training Program, 20 U.S.C., Section 802(b) (4).

The Department of Community Affairs is directed by Missouri law to perform the following functions, which in my opinion are related to the purposes of the federal law herein considered.

"(2) Assist local governments by establishing and maintaining a program of training for local governmental officials and other personnel;

"(4) Study and recommend to the governor methods of more effectively coordinating the programs of state agencies that affect the development of communities and the operation of political subdivisions;

* * *

"(7) Encourage educational institutions in the state to develop research activities and to provide educational programs for state and local governments in order to foster community development;

"(8) Exercise the state's responsibility for administering, supervising, coordinating and generally performing the role of state government as set forth in those federal programs

Mr. Gene Sally

concerning community affairs which are assigned to the department by the general assembly or by the governor;" (Section 251.030(2), (4), (7), and (8), RSMo 1969)

Missouri law also authorizes the Governor to make other assignments to the Department of Community Affairs relating to planning and community development as provided for in Article IV, Section 12, Constitution of Missouri and various legislative acts of Congress (Section 251.200, RSMo 1969).

Finally, Missouri law empowers the Department of Community Affairs to receive and utilize grants or other financial assistance made available by the federal government for performing the Department's functions (Section 251.190, RSMo 1969).

We are not aware that there has been, or that there is now pending any litigation that would limit, impair or otherwise affect the powers of the Department of Community Affairs in carrying out community development programs.

Accordingly, it is my opinion that the Department of Community Affairs has the responsibility and authority under Missouri law to carry out the functions of the designated state agency as specified by the Community Development Training Program (Part I, Title VIII, Housing Act of 1964, P. L. 88-560, 20 U.S.C., Sections 801, et seq.).

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
CANDIDATES:
LEGISLATORS:
SPECIAL ELECTIONS:

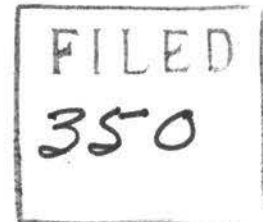
The American Party is an "established political party" within the 30th Legislative District of Missouri and has authority to nominate a candidate of such party for the

special election to be held in such district June 29, 1971, to fill a vacancy caused by the death of the representative from such district. The tender of a certificate of nomination of a candidate of the American Party for such office made to the Secretary of State June 15, 1971, should be accepted and filed by the Secretary of State.

OPINION NO. 350

June 17, 1971

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in answer to your letter of June 16, 1971, in which you ask whether a certificate of nomination filed in your office at 3:20 p.m. on Tuesday, June 15, 1971, was timely and whether the certificate is entitled to be accepted and filed by the Secretary of State. The certificate of nomination is one stating that Sterling Lacy was nominated as the American Party candidate for state representative from the 30th Legislative District for the special election to be held on June 29, 1971. The special election is one called by the Governor to fill a vacancy in the office of representative from the 30th Legislative District caused by the death of Representative Patrick J. O'Connor.

Two questions must be answered in order that it can be determined whether tender of the certificate of nomination on June 15, 1971, authorizes such certificate to be filed by the Secretary of State. The first question is whether the American Party is an "established political party" within such representative district, and the second question is whether the certificate was lawfully filed on the fourteenth day preceding the date of the special election.

This office held in Opinion No. 588, rendered December 18, 1970, to James C. Kirkpatrick that the American Party is no longer an "established political party" for the purpose of nominating candidates for statewide offices in Missouri because the only candidate of the American Political Party for state office received less than two percent of the vote in the November 1970 election. However, you

Honorable James C. Kirkpatrick

have informed us that one or more candidates of the American Party received more than two percent of the vote cast in the precincts constituting the 30th Legislative District although there was no candidate of the American Party for the office of representative from the 30th Legislative District. We hold that under the provisions of paragraph 5 of Section 120.160, RSMo 1969, a party, any candidate of which receives two percent of the vote in a district, continues as an "established political party" within such district until an election is held at which no candidate of such party receives two percent or more of the vote cast in the precincts comprising such district. Such paragraph provides as follows:

"The filing of a valid petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of, such new political party. If, at the election immediately following the election at which the names of the candidates of the party first appear on the ballot, any candidate or candidates of the new political party shall receive more than two percent of all votes cast at such election in the state, or two percent of the total vote cast in any district or political subdivision of the state, as the case may be, then the new political party shall become an established political party within the state or within the district or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as provided by law, except that if in any ensuing election the party fails to have a candidate or fails to receive two percent of the total votes cast at such election in the state, district or political subdivision, as the case may be, the party shall no longer be deemed an established party." (Emphasis added)

It is therefore our view that the American Party is at present an "established political party" within the 30th Legislative District and is authorized to nominate a candidate for the office of representative in such district as are the other "established political parties."

Honorable James C. Kirkpatrick

It is our view that the tender of the certificate of nomination of Mr. Lacy as the American Party candidate in the 30th Legislative District on June 15 for the election to be held on June 29, 1971, is timely and should be accepted and filed by the Secretary of State.

Paragraph 2 of Section 120.550, RSMo 1969, provides in part:

"Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. . . ."

We are enclosing Opinion No. 89 rendered September 6, 1955, to William E. Tipton holding that Section 120.550 is not applicable to a special election to fill a vacancy in the office of state senator. Such opinion is also applicable to a special election to fill a vacancy in the office of state representative. Such opinion was withdrawn only insofar as such opinion held that a candidate at such special election could not be nominated by a petition of electors. Therefore, the provision in paragraph 2 of Section 120.550, that the nomination to fill a vacancy caused by death shall be filed with the Secretary of State not later than fifteen days before the day fixed by law for the election to fill the vacancy does not apply to nominations of candidates at a special election to fill a vacancy in the office of a member of the House of Representatives. We find no other statutory provision as to the last date upon which such a certificate can be filed, and it is our view that in these circumstances certificates of nomination can be filed at any reasonable time before the election. We believe that if the certificate is filed at such time that the Secretary of State can certify to the officials conducting the election and such officials can arrange for the printing of ballots and conduct of the election generally the certificate is filed within a reasonable time. We believe it to be clear that fourteen days is ample time for the Secretary of State to accept the filing and certify such nomination to the officials conducting the election and for such officials to prepare ballots and otherwise arrange for the election.

CONCLUSION

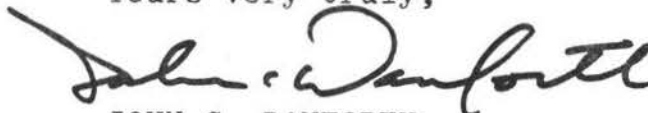
It is the opinion of this office that the American Party is an "established political party" within the 30th Legislative District of Missouri and has authority to nominate a candidate of such party for the special election to be held in such district June 29, 1971, to fill a vacancy caused by the death of the representative from such district. It is the further opinion of this office that

Honorable James C. Kirkpatrick

the tender of a certificate of nomination of a candidate of the American Party for such office made to the Secretary of State June 15, 1971, should be accepted and filed by the Secretary of State.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 89
9-6-55, Tipton

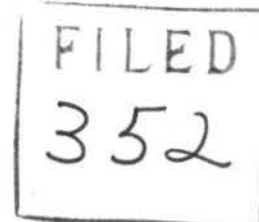
CITIES, TOWNS AND VILLAGES:
TAXATION (CITIES):

A fourth class city has authority under Senate Bill No. 64 of the 76th General Assembly to provide by ordinance without a vote by the people for a tax levy for municipal purposes of one dollar on the one hundred dollars assessed valuation for the year 1971 if such ordinance is enacted after the effective date of such bill.

OPINION NO. 352

July 30, 1971

Honorable James A. Noland, Jr.
Missouri Senate, 33rd District
Osage Beach, Missouri 65065



Dear Senator Noland:

This letter is in response to your request for an opinion in which you inquire concerning whether a fourth class city may by ordinance without a vote by the people levy for the year 1971, a property tax not in excess of one dollar on the one hundred dollars assessed valuation as provided in Senate Bill No. 64 of the 76th General Assembly.

The Bill, which is effective September 28, 1971 raises from 75 cents to one dollar on the one hundred dollars assessed valuation the maximum tax levy which a fourth class city may impose by an ordinance annually for municipal purposes without a vote by the people "upon all subjects and objects of taxation within such cities". The new Section, 94.250, bears the same number as did the old section.

The principal question confronting us is whether the imposition of the additional 25 cent levy for the tax year 1971 would be in violation of Section 13, Article I of the Missouri Constitution which prohibits laws retrospective in their operation.

We do not believe that the imposition of the one dollar general property tax levy for the year 1971 would be illegal.

The Missouri Supreme Court held in Long v. City of Independence, 229 S.W.2d, 686, referring to the provisions relative to annual assessment of property, now Section 137.080, RSMo 1969:

Honorable James A. Noland, Jr.

"The section deals with two matters: The 'official assessments' (The final results of one of the procedures in the taxation process), and that particular procedure itself (the assembling of the data upon which the official assessments are based). ... The result of this process, which commences January 1 and is not completed until months later, is the 'official assessment' as to each individual person or property unit."

The court continued, stating that while this official assessment is not made on January 1, it is as of that date so far as assessment of property is concerned.

The court stated with respect to what is now Section 137.075, RSMo 1969:

"'Every person owning or holding real property or tangible personal property on the first day of January * * * shall be liable for taxes thereon during the same calendar year.' Here the date is used, not as an assessment date, but as a date for fixing 'liability for taxes,' in amounts thereafter to be determined. ... The lien for state and county taxes is inchoate and becomes 'fixed in amount by relation back to that date after the assessment and levy was completed'."

In commenting upon the holding of the Missouri Supreme Court in City of Westport v. McGee, 30 S.W. 523, the Court in the City of Independence case stated:

"In City of Westport v. McGee, supra, the city, which had extended its boundaries on May 12, levied the taxes on May 20 upon the basis of the county's assessments. Sustaining the taxes, we said of the taxpayer's contention (identical with appellants' here): 'He assumes that, because the initial day of the assessment fixes the commencement of the lien for state and county taxes, * * * city taxes must also relate * * * to that date * * * and that as his land was not in the city at the time fixed for the attaching of the liability, and could not [on such date] be charged with city taxes, any subsequent levy by the city upon the valuation fixed by the state and

Honorable James A. Noland, Jr.

county assessment was without the sanction of law. But we think this is a misapprehension of the purpose and effect of the legislation on this subject.'"

While the court in the City of Independence case did not directly consider Section 13, Article I of the Missouri Constitution, it is our view that the court's holding did dispose of the question.

CONCLUSION

It is the opinion of this office that a fourth class city has authority under Senate Bill No. 64 of the 76th General Assembly to provide by ordinance without a vote by the people for a tax levy for municipal purposes of one dollar on the one hundred dollars assessed valuation for the year 1971 if such ordinance is enacted after the effective date of such bill.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" and last name "Danforth" clearly distinguishable.

JOHN C. DANFORTH
Attorney General

July 13, 1971

OPINION LETTER NO. 353
Answered by Klaffenbach

Honorable Ronald R. McKenzie
Prosecuting Attorney
Marion County
Tower Plaza Office Building
Hannibal, Missouri 63401



Dear Mr. McKenzie:

This letter is in response to your opinion request in which you ask the following two questions:

"1. If an additional County Jail may be built in Hannibal, Missouri, or another place in said County, must said County maintain a County Jail at the County Seat of Marion County, at Palmyra, Mo.

"2. May the County Court build and maintain an additional County Jail at Hannibal, Missouri, or any-other place in the County it chooses -- that is, if the County Court decided to build an additional County Jail, other than or in addition to the County Jail at Palmyra, Missouri, must it be built in Hannibal, Missouri, or could it be built - say - midway between Palmyra and Hannibal, Missouri, but in Marion County."

You have indicated and are correct of course that the county seat of Marion County is Palmyra and the Hannibal Court of Common Pleas is held at Hannibal, Missouri.

In answer to your second question first, you have also indicated that you have a copy of Opinion No. 88, dated April 1, 1971, to the Honorable A. J. Seier in which we held that unless the exceptions to Section 49.310, RSMo 1969, apply the jail must be erected at the county seat. We believe that this opinion answers your second question. That is, the Hannibal Court of Common Pleas

Honorable Ronald R. McKenzie

is established under Section 480.190, RSMo 1969, and under Section 480.200, RSMo 1969, within the limits of Mason and Miller townships in the County of Marion exercises exclusive original jurisdiction in all civil actions and also in all criminal actions as are had and exercised by the circuit courts of this state.

Section 49.310 authorizes the county court to construct a jail at more than one place when more than one place is provided by law for holding of court. Therefore, in the premises the county court has authority to build a jail at both Palmyra in Marion County and at Hannibal. It does not have authority to build a jail anyplace else in Marion County and therefore, does not have authority to build a jail at a location between Palmyra and Hannibal.

In answer to your first question while we might reach a different result if the legislature authorized the holding of such court at two places not including the county seat, it is our view that this section does not authorize the building of a jail at only Hannibal and not at the county seat at Palmyra. In the premises Section 49.310 requires that the jail be at the county seat but authorizes the building of an additional jail at Hannibal where the Court of Common Pleas is located.

Very truly yours,

JOHN C. DANFORTH
Attorney General

LICENSES:
MERCHANTS:
ITINERANT VENDORS:
TAXATION (MERCHANTS AND
MANUFACTURERS):

1. That a person, who in the county of his residence opens a place of business for the purpose of the seasonal sale of fireworks, is:

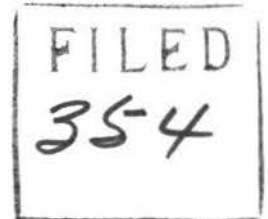
(a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b)

not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo. 2. That a person who is a wholesale supplier of fireworks to retailers, who does not manufacture such fireworks, who is not in a temporary or transient business of selling goods, wares, and merchandise from a structure for the exhibition and sale of such goods, wares, and merchandise, and who does not sell door to door, is: (a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b) not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is not an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo.

OPINION NO. 354

August 31, 1971

Honorable Channing D. Blaeuer
Prosecuting Attorney
Randolph County
211 West Reed Street
Moberly, Missouri 65270



Dear Mr. Blaeuer:

This is in reply to your request for an official opinion of this office concerning the question whether the provisions of Chapter 150, RSMo, apply to a person, who in the county of his residence opens a place of business for the purpose of the seasonal sale of fireworks, and also asking whether such chapter applies to the suppliers of fireworks to such vendor.

Chapter 150 provides for merchants', manufacturers', itinerant vendors', and peddlers' licenses and taxes.

Sections 150.010 through 150.290, RSMo, provide for a merchants' license with a nominal fee, and an ad valorem tax, with merchant defined in Section 150.010 as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the

Honorable Channing D. Blaeuer

selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

Section 150.020 provides:

"The term 'merchant', as used in sections 150.010 to 150.290, shall be construed to include all merchants, commission merchants, grocers, manufacturers and dealers in drugs and medicines, except physicians for medicines used in their practice, whether trading as wholesale or retail dealers."

This definition of "merchant" is for ad valorem tax purposes. Section 150.040; Campbell Baking Co. v. City of Harrisonville, Mo., C.C.A., 50 F.2d 670, 675.

Manufacturers are licensed and taxed in the same manner as merchants are licensed and taxed, Section 150.310, pursuant to the provisions of Sections 150.300 through 150.370. A manufacturer is defined in Section 150.300 as follows:

"Every person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer for the purposes of sections 150.300 to 150.370."

Sections 150.380 through 150.460 pertain to itinerant vendors. A license is required, with payment of a license fee, Section 150.390, but there is no provision for ad valorem taxation. An itinerant vendor is defined in Section 150.380 as follows:

Honorable Channing D. Blaeuer

"1. The words 'itinerant vendor', for the purposes of sections 150.380 to 150.460, shall mean and include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise.

"2. The provisions of sections 150.380 to 150.460 shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural society during the continuance of any annual fair held by such society."

Finally, peddlers are required to also obtain a license upon payment of a fee. Sections 150.470 through 150.540. There is no provision in these sections for payment of an ad valorem tax. A peddler is defined in Section 150.470 as follows:

"Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

I

The first question is whether a person, in the county of his residence, who opens a place of business for the seasonal sale of fireworks is subject to the provisions of Chapter 150.

Honorable Channing D. Blaeuer

It is our opinion that such person is dealing in the selling of goods, wares, and merchandise at a store, stand or place occupied for that purpose; and, therefore, such person is a merchant subject to license and payment of ad valorem taxes pursuant to Sections 150.010 through 150.290. Section 150.020; and see State v. Whittaker, 33 Mo. 457. Assessments are made pursuant to Sections 150.050 and 150.180.

Such person is not a manufacturer subject to Sections 150.300 through 150.370 because he is not holding or purchasing property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials.

If such person has the intention of continuing in his business in one place for a period of not more than 120 days, then, it is our further opinion that he is subject to an itinerant vendor's license under Sections 150.380 through 150.460 because from the facts you have stated, we assume he will conduct in one locality a temporary business of selling goods, wares, and merchandise and for the purpose of such business occupies a building or other structure for the exhibition and sale of such goods, wares, and merchandise. Section 150.380; and see State v. Long, 203 Mo.App. 427, 220 S.W. 690; and City of St. Louis v. Weitzel, 130 Mo. 600.

Finally, such person is not subject to Sections 150.470 through 150.540 because he is not selling goods, wares or merchandise by going about from place to place and is, therefore, not a peddler. Section 150.470.

II

The second question is whether Chapter 150 applies to the supplier of fireworks to the vendor discussed in question one. We assume your question concerns what is commonly called a wholesaler who sells to retailers, and is not the person manufacturing the goods.

It is our opinion that such person is a merchant because wholesale dealers are included in Section 150.020 construing the term "merchant" as used in Sections 150.010 to 150.290.

Since we have assumed from your question that such person is not manufacturing, he is not required to obtain a manufacturer's license under Section 150.300.

As to whether such person may be subject to Sections 150.380 through 150.460, since you have not stated facts that indicate a

Honorable Channing D. Blaeuer

temporary or transient business of selling goods, wares, and merchandise from a room, building or other structure, for the exhibition and sale of such goods, wares, and merchandise, we conclude that such person is not an itinerant vendor. Section 150.380.

Finally, there is the question whether such person is a peddler subject to Sections 150.470 through 150.480. In *State v. Smithson*, 106 Mo. 149, 17 S.W. 221, it was held that one who carries around goods from door to door and sells them is a peddler, whether the goods belong to him, or to another.

However, a person going from house to house, who carries nothing to be sold and delivered, having with him only samples, which he does not sell, but only solicits orders for goods, which orders are to be forwarded to his employer, and the sale is not complete until acceptance by the employer and delivery at a future date, is not a peddler. *State v. Hoffman*, 50 Mo.App. 585.

On this question, since we have assumed your question relates to a wholesaler, we further assume such person is not selling goods door to door, and therefore, we conclude that such a person is not a peddler.

CONCLUSION

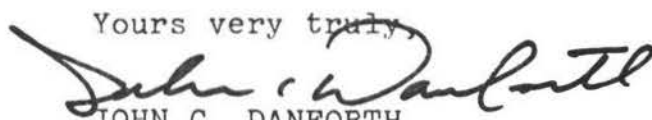
It is the opinion of this office:

1. That a person, who in the county of his residence opens a place of business for the purpose of the seasonal sale of fireworks, is: (a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b) not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo.

2. That a person who is a wholesale supplier of fireworks to retailers, who does not manufacture such fireworks, who is not in a temporary or transient business of selling goods, wares, and merchandise from a structure for the exhibition and sale of such goods, wares, and merchandise, and who does not sell door to door, is: (a) a merchant subject to Sections 150.010 through 150.290, RSMo; (b) not a manufacturer and is not subject to Sections 150.300 through 150.370, RSMo; (c) is not an itinerant vendor subject to Sections 150.380 through 150.460, RSMo; and (d) is not a peddler and is not subject to Sections 150.470 through 150.540, RSMo.

The foregoing opinion, which I hereby approve, was prepared by Assistant, Walter W. Nowotny, Jr.

Yours very truly,


JOHN C. DANFORTH
Attorney General

COUNTIES:
WASTE DISPOSAL:
DUMPING GROUNDS:

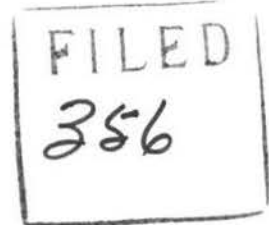
A third class county has the authority pursuant to Section 64.490, RSMo 1969, to operate a county solid waste disposal area. A third

class county has the authority to finance the operation of a solid waste disposal area by general obligation bonds but not by revenue bonds.

OPINION NO. 356

July 19, 1971

Honorable Stanley J. Murphy
Prosecuting Attorney
St. Francois County Courthouse
Farmington, Missouri 63640



Dear Mr. Murphy:

This is in reply to your request for an official opinion of this office concerning two questions relating to county waste disposal.

I

Does a third class county have the authority to operate a county solid waste disposal area?

In 1967 the legislature enacted Section 64.490, RSMo, which reads as follows:

"1. Any county of the second, third or fourth class may purchase or lease, maintain and operate a dumping grounds for the disposal of ashes, garbage, refuse and rubbish as defined in sections 64.460 to 64.487 and may agree or contract with any municipality within the county for the operation of a dumping grounds, as provided in chapter 70, RSMo.

"2. Any dumping grounds operated under the provisions of this section shall be inspected by the state division of health and is subject to the rules and regulations promulgated by the division pursuant to section 64.477."

It would seem most apparent from this statute that the answer to your question is in the affirmative. However, as stated in attachments to your letter, a question has been raised by the United

Honorable Stanley J. Murphy

States Department of Agriculture that Section 64.490 only authorizes dumping grounds, which are not the same and presumably not as extensive as waste disposal facilities, which it is contended are authorized by the County Option Dumping Ground Law, Sections 64.460 through 64.487, RSMo.

An examination of these sections reveals no use of any certain language which would indicate any difference in types of disposal areas designated by Sections 64.460 through 64.487 as distinguished from Section 64.490.

Section 64.460 merely defines "ashes," "garbage," "refuse," and "rubbish." Section 64.463, RSMo, prohibits disposal of ashes, garbage, rubbish or refuse at any place except a "disposal area licensed as provided in sections 64.460 to 64.487."

Applications for licenses for disposal areas are made pursuant to Section 64.467. Inspections of proposed sites are made by the State Division of Health, Section 64.470, pursuant to rules and regulations promulgated by the Division of Health, Section 64.477. Such rules and regulations are on file with the Secretary of State's Office and require what is commonly known as a sanitary landfill.

Thus, any person in a county where the County Option Dumping Ground Law has been put into effect, Section 64.483, can only dispose of ashes, garbage, rubbish or refuse at a licensed disposal area licensed pursuant to rules and regulations of the Division of Health.

Under Section 64.490 a third class county may operate a "dumping ground" for the disposal of the same ashes, garbage, refuse and rubbish. Such a "dumping ground" is subject to the same rules and regulations as licensed "disposal areas."

Therefore, in our opinion a "dumping ground" is the same as a "disposal area" and a third class county has the authority to operate a county solid waste disposal area.

II

Does a third class county have the authority to finance the operation of a solid waste disposal area by either revenue or general obligation bonds?

A county has only such authority as is expressly given them and such implied authority as is necessary to execute the express power given. *Lancaster v. County of Atchison*, 180 S.W.2d 706 (Mo. banc 1944).

Honorable Stanley J. Murphy

The following constitutional provisions provide for political subdivisions to be indebted, reading as follows:

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property." (Article VI, Section 26(b))

"Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur and additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)." (Article VI, Section 26(c))

To implement the quoted constitutional provisions, the legislature has enacted what now appears as Chapter 108, RSMo, providing the mechanics for the conduct of elections to test the sense of the electorate upon proposals to increase the indebtedness of counties. Found in such chapter are Sections 108.010 and 108.020, which read as follows:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five percent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes." (Section 108.010, RSMo 1969)

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for

Honorable Stanley J. Murphy

county purposes in addition, to that authorized in section 108.010 not to exceed five percent of the taxable tangible property shown as provided in said section." (Section 108.020, RSMo 1969)

The foregoing constitutional and statutory provisions disclose that counties of any class, including third class counties, do have the authority to become indebted through the issuance of general obligation bonds for public county purposes. We find no such authority, however, for revenue bonds.

Therefore, the question becomes whether the operation of a solid waste disposal area is one for which such an indebtedness may be incurred upon an affirmative vote of the requisite number of electors.

Subsection 1 of Section 64.490, as quoted above, provides that second, third or fourth class counties may operate such an area. Therefore, it is our opinion that a third class county has the authority to finance the operation of a solid waste disposal area by general obligation bonds.

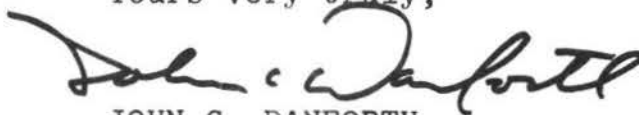
CONCLUSION

It is the opinion of this office that:

1. A third class county has the authority pursuant to Section 64.490, RSMo 1969, to operate a county solid waste disposal area; and
2. A third class county has the authority to finance the operation of a solid waste disposal area by general obligation bonds but not by revenue bonds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



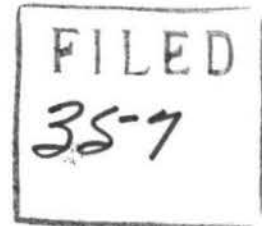
JOHN C. DANFORTH
Attorney General

LABOR:
DIVISION OF MENTAL HEALTH:

The Division of Mental Health cannot agree with representatives of the employees to make promotions or transfers based upon seniority.

OPINION NO. 357

July 22, 1971



George A. Ulett, M.D.
Director
Division of Mental Health
Post Office Box 687
Jefferson City, Missouri 65101

Dear Dr. Ulett:

This opinion is in answer to your request in which you ask two questions. The first question asks whether the Division of Mental Health may agree with representatives of the employees to make promotions of employees "from the list of qualified employees, according to the rules and regulations of the Personnel Advisory Board, by seniority."

The second question asks whether by such agreements transfers within the division of qualified personnel may be based on "the requirements and needs of the Division of Mental Health according to seniority."

With respect to your first question, we note that Section 36.030, RSMo 1969, subsection 2 states:

"The system of personnel administration governs the appointment, promotion, transfer, layoff, removal and discipline of employees and officers and other incidents of employment in divisions of service subject hereto and all appointments and promotions to positions subject to this law shall be made on the basis of merit and fitness to be ascertained by competitive examinations."

The corresponding rule of the Personnel Advisory Board, Rule 1.1, states the purposes of the "State Merit System Law" to be "to establish for certain employees of the state, a system of personnel administration based on merit principles and designed to secure efficient administration" and "to govern the appointment, promotion,

George A. Ulett, M.D.

transfer, layoff, removal, and discipline of certain employees and other incidents of state employment on the basis of merit and fitness."

Under subsection 1 of Section 36.150, RSMo 1969, "[e]very appointment or promotion to a position covered by this law shall be made on the basis of merit determined by such person's eligibility rating established by competitive examinations. . . . No appointment, promotion, demotion or dismissal shall be made because of favoritism, prejudice or discrimination." Under subsection 7 of this section, any officer or employee in a position subject to this law who violates any of the provisions of this section shall forfeit his office or position. (See also Personnel Advisory Board Rule 15.4.)

The rules of the Personnel Advisory Board also set up a comprehensive system for promotional examinations, Rule 7.3(b), promotional registers, Rule 8.2(b), methods of filling vacancies, Rule 9.2, and selection by the appointing authority for the purpose of filling vacancies from the list of eligibles maintained by the Personnel Advisory Board, Rule 9.3. These rules, of course, largely reflect the language of the Merit System statutes, Chapter 36.

Under Section 36.240, RSMo 1969, in filling a vacancy in a permanent position subject to this law the appointing authority shall be entitled to choose from among the three highest ranking available eligibles certified to him by the director of the personnel division of the department of business and administration and if more than one position in a class is to be filled at a time, the appointing authority shall be entitled to choose from among at least two more eligibles than the number of positions to be filled.

In addition, Section 19 of Article IV of the Missouri Constitution provides:

"The head of each department may select and remove all appointees in the department except as otherwise provided in this Constitution, or by law. All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; provided that any honorable discharged member of the armed services of the United States who is a citizen of this state and was such on entering the service, shall have preference in examination and appointment as prescribed by law."

George A. Ulett, M.D.

We note the following statement of the Court of Appeals of New York in People ex rel. Balcom v. Mosher, 163 NY 32, 57 NE 88 (1900) at l.c. 90:

" . . . The decisions of this and other courts, state and federal, as to the meaning of the word 'appointment,' and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that, while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. . . . "

An act which an officer may do or may not do in the exercise of his official discretion cannot be considered a ministerial act. State ex inf. Gentry v. Toliver, 315 Mo. 737, 287 SW 312 (1926). A public officer cannot delegate his power or duties. Henschel v. Fidelity & Deposit Co. of Maryland, 87 F.2d 833 (8th Cir. 1937); State ex rel. Skrainka Const. Co. v. Reber, 226 Mo. 229, 126 SW 397 (1910).

Further, as stated by the Supreme Court of Missouri in City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947) at l.c. 545:

" . . . If such [legislative] powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. . . . "

The question next arises as to whether under Sections 105.500, RSMo 1969, et seq., of the labor organization statutes the director

George A. Ulett, M.D.

of the Division of Mental Health may waive the exercise of his discretion or of the discretion of any appointing authority within his administrative control. Our answer to that question is that the discretionary authority of such state officers is founded upon statutory authority and is not subject to delegation or waiver by agreement or resolution. We believe that this is especially clear in the areas in question which involve the fundamental rights of all individuals under a merit system founded upon the clear requirement of the Missouri Constitution that employees "shall be selected on the basis of merit." Section 19, Article IV, Missouri Constitution.

Thus in our view, it would be contrary to the purposes of the merit system, in violation of the statutes and in derogation of the powers of the appointing authority under Chapter 202, relating to the administration of the state mental institutions and Chapter 36, the merit system statutes for promotions to be determined on the basis of seniority.

Under Section 36.280, RSMo 1969, an appointing authority may "at any time assign an employee from one position to another position in the same class in his division." (See companion Rule 9.5.)

In our view, a predetermination by an appointing authority on the basis of seniority in effecting such a transfer is in derogation of the power and duty of the appointing authority to effect such transfers based upon other considerations.

In reflecting generally upon the consideration to be given to seniority, we note that the legislature expressly provided with respect to layoffs that "seniority and service ratings of employees shall be considered, in such manner as the regulations shall provide, among the factors in determining the order of layoffs." Section 36.360, RSMo 1969. (See also Rule 12.1 of the Personnel Advisory Board Rules and Regulations.)

Neither the Constitution nor the statutes permit selection for promotion or transfers based on seniority.

CONCLUSION

It is the opinion of this office that the Division of Mental Health cannot agree with representatives of the employees to make promotions or transfers based upon seniority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Note:

The conclusion reached in this letter opinion is still correct, however, Opinion No. 25-63 was withdrawn because of the provisions of House Bill No. 8, 82nd General Assembly respecting licensed practical nurses. See Section 537.037.
December 23, 1971

OPINION LETTER NO. 358
Answer by letter-Wood

Herbert R. Domke, M.D.
Director
Division of Health
221 West High Street
Jefferson City, Missouri 65101



Dear Dr. Domke:

You have requested my opinion on the following questions:

"Questions are frequently received in the Division of Health from physicians, hospital administrators and nursing home administrators regarding the administration of blood transfusions by a registered nurse in hospitals and nursing homes.

"I would like to raise two questions:

- "1. May a nurse administer a blood transfusion on the order of a physician in a hospital or nursing home?
- "2. May a physician initiate the transfusion to his patient in a hospital or nursing home and then leave the hospital or nursing home and delegate the responsibility to a registered or licensed practical nurse to give the necessary attention to the patient during the remainder of the transfusion?"

Herbert R. Domke, M.D.

In Opinion No. 25 dated January 18, 1963, to Daniel R. Reardon, Jr., copy enclosed, this office concluded that a registered professional nurse could administer certain fluids intravenously. We believe the conclusion therein stated is applicable to blood transfusions.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 25
1-18-63, Reardon

December 2, 1971

OPINION LETTER NO. 359
Answer by letter-Wood

Honorable Don Randall
Representative, District 82
4011 Pickett Road
St. Joseph, Missouri 64503



Dear Representative Randall:

You have requested my opinion on whether or not Lake Contrary is an oxbow lake. You state that it is your intention to introduce a bill in the next session of the legislature to provide funds for a dredge for Lake Contrary if state funds can be spent for this purpose. Therefore, we regard your essential question to be whether Lake Contrary belongs to the State of Missouri.

We are enclosing a memorandum opinion of this office prepared in 1958 which concluded that the lands presently beneath the waters of Lake Contrary belonged to the State of Missouri. We believe that conclusion to be still valid and that it would therefore be proper for the General Assembly to provide state funds for dredging Lake Contrary.

Yours very truly,

JOHN C. DANFORTH
Attorney General

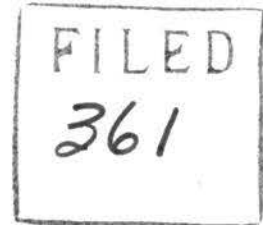
Enclosure: Memorandum Op. No. 101
Dalton, 1958

June 22, 1971

Answer by Letter-Nowotny

OPINION LETTER NO. 361

Mr. Jack K. Smith, Executive Secretary
Missouri Water Pollution Board
P. O. Box 154
Jefferson City, Missouri 65101



Dear Mr. Smith:

This is in reply to your request for official opinion of this office concerning whether the State of Missouri in 1971 has appropriated state funds for purposes of matching funds allocated by the federal government for water pollution control projects.

The purpose of your opinion request is to comply with a federal request that an opinion be given indicating the following:

- "A. That the legislation appropriating the money passed.
- "B. That Missouri officials can enter into an agreement unconditionally obligating the State to provide 25 percent matching grants funds.
- "C. That the officials signing the agreement obligating the State to pay the 25 percent are authorized."

The State is authorized, under Sections 204.200, 204.210 and 204.220, RSMo 1969, to make grants to counties, municipalities and sewer districts for purposes of matching funds allocated by the federal government for water pollution control projects. Accordingly, the 76th General Assembly of Missouri has appropriated for the period beginning July 1, 1971, and ending June 30, 1972, the sum of \$6,512,236 dollars from general revenue for matching funds allocated by the federal government. Conference Committee Substitute For House Bill No. 6, Section 6.185. Therefore, in answer to question "A", the appropriation bill passed.

Mr. Jack K. Smith

In answer to questions "B" and "C", the Missouri Water Pollution Board is authorized to and can enter into an agreement unconditionally obligating the State to provide 25 percent matching grant funds, within the appropriation, of course. Section 204.220, RSMo 1969.

Yours very truly,

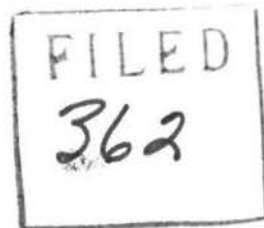
JOHN C. DANFORTH
Attorney General

CART:
COUNTY COURTS:
ROADS AND BRIDGES:

Contracts by a county court for the building of roads from funds derived from the County Aid Road Trust Fund cannot be awarded without competitive bidding.

OPINION NO. 362

September 20, 1971



Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri 64856

Dear Mr. Paul:

This is in response to your request for an opinion as to whether a county court can award contracts for the building of roads from funds derived from gas tax refunds without competitive bidding.

We assume that your reference to a "gas tax refund" refers to funds available to the counties from the County Aid Road Trust Fund, as set out by Article IV, Section 30(a) of the Missouri Constitution. With respect to these funds, this section provides:

" . . . The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. In the absence of other controls provided by law, the state highway commission shall prescribe policy, rules and requirements for the expenditure of these funds by counties, including, among other things, highway commission approval of plans for projects on which the funds are to be used. . . ." (emphasis added)

Thus, all restrictions applying to the expenditure of funds by the county generally will apply to the expenditure of County Aid Road Trust moneys.

Section 50.660, RSMo 1969, of the County Budgeting Law, provides in pertinent part that:

Honorable James L. Paul

". . . All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse. It is not necessary to obtain bids on any purchase in the amount of one hundred dollars or less made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. . . ."

Section 229.050, RSMo 1969, which deals specifically with the construction of roads by contract, provides:

"1. Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be constructed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of five hundred dollars, the county, township or district authorities shall order the county highway engineer, or other engineer in their employ, or both such engineers acting together, if so desired, to prepare and file with the clerk of the court, township board or district commissioners, as the case may be, all necessary maps, plans, specifications and profiles, and an estimate of the cost of the work. The court or other proper authority may approve or reject the maps, plans, specifications and profiles and order others prepared and filed.

"2. When the maps, plans, specifications and profiles have been approved, the county, township or district authorities shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed, which said

Honorable James L. Paul

advertisement shall be published once a week for three consecutive weeks, the last insertion to be within ten days of the day of letting.

"3. All bids shall be in writing, accompanied by instructions to bidders which shall be furnished by the engineer upon application. All bids on road work shall state the unit prices upon which the same are based. All bids shall be sealed and filed with the clerk of the county court, township board or special road district commissioners, and, on the day and at the hour named in the advertisement, shall be publicly opened and read in the presence of the court, township board or special road district commissioners, and the engineer, and shall then be recorded in detail in some suitable book. All bids shall be accompanied by a certified check equal to ten percent of the engineer's estimate of cost, payable to the county treasurer, to the use of the county, township or road district, as the case may be, or a bidder's bond executed by some surety company authorized to do business in this state or other good and sufficient surety in a like sum shall be given, as a guarantee on the part of the bidder that if his bid be accepted he will, within ten days after receipt of notice of such acceptance, enter into contract and bond to do the work advertised, and in case of default forfeit and pay sum of ten percent of the engineer's estimate of cost.

"4. The contract shall be awarded to the lowest responsible bidder. The court may in its discretion reject any or all bids. Any bid in excess of the engineer's estimate of the cost of the work to be done shall be rejected. When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be. The contract shall have attached to and make a part thereof the proposal sheet, instructions to bidders, and bid, maps, plans, specifications and profiles.

Honorable James L. Paul

"5. Whenever the contract is executed and approved by order of record and endorsement thereon, it shall be filed and preserved as a permanent record. It shall be incorporated in the contract that the county, township or special road district shall reserve the right to make any additions to, omissions from, changes in or substitutions for the work or materials called for by the drawings and specifications, without notice to the surety on the bond given to secure the faithful performance of the terms of the contract. The bidder must agree that before the county or political subdivision shall be liable for any additional work or material, the county or political subdivision must first order the same, and the cost thereof must be agreed upon in writing and entered of record before such additional work shall apply in case of omissions, deductions or changes, and the unit prices shall be the basis of the values of such changes.

"6. In case of disagreement upon the cost or price of any addition, omission or change ordered or so desired, then it is expressly agreed that the decision of the state highway engineer shall be received and accepted as fixing definitely and finally the cost of such change, and when so fixed, the court, township board cost or price of any addition, omission shall enter of record such change. It shall also be provided in the contract that the contractor will furnish and promptly pay for all labor employed and materials used in the performance of such contract."

Thus, it can be seen that competitive bidding is required in the awarding of contracts by the county court for building of roads from funds derived from County Aid Road Trust Fund moneys. The type of notice to prospective bidders called for depends upon the estimated cost of the road building project. Where the estimated expenditure is in excess of five hundred dollars, the notice provisions contained in Section 229.050, sub. 2, must be followed. Where the estimated expenditure is less than five hundred dollars, the notice provisions of Section 50.660 are to be followed.

Honorable James L. Paul

CONCLUSION

It is the opinion of this office that contracts by a county court for the building of roads from funds derived from the County Aid Road Trust Fund cannot be awarded without competitive bidding.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

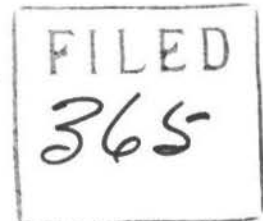
ELECTIONS:
PRESIDENTIAL ELECTORS:

An individual eighteen years of age is not disqualified from being chosen as a presidential elector for Missouri.

OPINION NO. 365

July 8, 1971

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This official opinion is issued in response to your request of June 22, 1971, in which you ask whether a person eighteen years of age is eligible to be selected as a presidential elector for Missouri.

Presidential electors are provided for by Article II, Section 1 of the Constitution of the United States, and the constitutional provision is implemented by Title 3 U.S.C., Sections 1 through 6. Neither the Federal Constitution nor the federal statutes specify any qualifications as to age or otherwise. Article II, Section 1 of the United States Constitution provides, in fact, that:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, . . ."

Public Law 91-285 (1970), 42 U.S.C. 1973bb, provides for voting by persons eighteen years of age and older but says nothing about the eligibility of any persons to serve as electors.

Presidential electors are state officers, and not federal officers, even though they perform a federal function. *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937); cert. denied 303 U.S. 644. State regulation of the manner of choosing delegates for national conventions and of voting for electors have regularly been upheld. See *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968). A state is obliged to provide a reasonable method by which minority parties may nominate candidates for presidential electors (*Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968)), but there is no federal case law as to who may be an elector.

We perceive no federal obstacle to the state's providing by law for the qualifications of presidential electors, subject possibly to a requirement that the qualifications be reasonable. In

Honorable James C. Kirkpatrick

the early case of *In re George H. Corliss*, 11 R.I. 638 (1878), the authority of a state to provide that electors could not hold other office was upheld.

Article VII, Section 8 of the Constitution of Missouri provides as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, . . ."

The only other state constitutional provision as to qualifications for officers is found in Article IV, Section 17. This provision applies to elected state officers in named offices and to appointed officers, but does not purport to cover presidential electors. It has no language which could be construed as imposing an age requirement for electors.

Nor do we find any statutory provision about the qualifications of electors. Section 120.840, RSMo 1969, provides for the nomination of electors by conventions of political parties, and parts of Chapters 111 and 128, RSMo, deal with the manner of choosing electors. These sections contain no restriction on the right of the parties to nominate, or of the voters to choose, any person they care to as a presidential elector.

Section 475.010(5), RSMo 1969, defines a "minor" as "any person who is under the age of twenty-one years." Section 1.020(14), RSMo 1969, defines "under legal disability" as including "persons under the age of minority." The statutes enumerate various disabilities such as, for example, in the making of contracts (Section 475.010, RSMo 1969), or the purchase of intoxicating liquors (Section 311.325, RSMo 1969), but we find no provision imposing a general disability on "minors" as defined in the statutes.

Article VII, Section 2 of the Missouri Constitution establishes the minimum age of twenty-one for voters. This provision has been superseded as to election of presidential electors, and senators and congressmen by Public Law 91-285 (1970), 42 U.S.C. 1973bb, which was upheld as to those elections (but not as to other elections), in *Arizona v. United States*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed. 2d 272 (1970). The provision of Article VII, Section 2 of the Missouri Constitution relating to age has been superseded as to other elections by Amendment XXVI to the United States Constitution, Section 1 of which provides as follows:

Honorable James C. Kirkpatrick

"Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age."

There is no requirement of federal or state law, however, that a person be a qualified voter in order to be eligible to serve as elector.

In State ex rel. Crow v. Hostetter, 137 Mo. 636, 39 S.W. 270 (1897), the Supreme Court of Missouri held that a women was qualified to hold office when there was no specific provision disabling her from so doing. This decision was rendered at a time when women did not have the right to vote and therefore stands for the proposition that a condition that an officeholder be a qualified voter will not be implied. The reasoning would apply to presidential electors.

We find no express provision as to the age of presidential electors, and no basis for implying a condition that an elector be twenty-one years of age.

CONCLUSION

It is the opinion of this office that an individual eighteen years of age is not disqualified from being chosen as a presidential elector for Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

July 7, 1971

OPINION LETTER NO. 366
Answered by Klaffenbach

Honorable David A. Dalton
Prosecuting Attorney
St. Charles County
Court House
St. Charles, Missouri 63301



Dear Mr. Dalton:

This letter is in answer to the opinion request made by your Assistant Mr. Robert M. Wohler, which is stated as follows:

"Fairway Estate is a subdivision, almost completely developed and housing approximately 212 homes, situated in St. Charles County, and outside the incorporated limits of the City of St. Charles, Missouri. The subdivision has paved streets and no sidewalks. The streets have been dedicated and all necessary plats recorded.

"1. May the County Court of St. Charles County, or any other body, authorize stop signs, or any other traffic control signs, to be erected at appropriate places for traffic safety within the subdivision? If so, under what authority?

"2. If so, may enforcement be had if violations occur as to those signs?

"If your answer to Question No. 1 is in the negative, is there any recourse as to the residents of the subdivision under existing law for traffic control and safety?"

We previously issued and herewith enclose our Opinion No. 456, dated October 14, 1970 to the Honorable Fred W. Meyer, which is self-explanatory.

Honorable David A. Dalton

We note that the 75th General Assembly enacted Senate Bill 180 which is now designated in part as Section 304.351, RSMo 1969. That section provides in part as follows:

"4. The state highway commission with reference to state highways and local authorities with reference to other highways under their jurisdiction may designate through highways and erect stop signs or yield signs at specified entrances thereto, or may designate any intersection as a stop intersection or as a yield intersection and erect stop signs or yield signs at one or more entrances to such intersection.

"(1) Preferential right-of-way at an intersection may be indicated by stop signs or yield signs as authorized in this section:

"(a) Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection, indicated by a stop sign, shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic in the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on the highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

"(b) The driver of a vehicle approaching a yield sign shall in obedience to the sign slow down to a speed reasonable to the existing conditions and, if required for safety to stop, shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway. After slowing or stopping the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another highway so closely as to constitute an immediate hazard during the time such traffic is moving across or within the intersection."

Honorable David A. Dalton

We also call your attention to Section 304.341, RSMo 1969, which was also a part of Senate Bill No. 180 of the 75th General Assembly. Subsection 3 of section 1 of that section provides:

"(3) The highway commission or local authorities in their respective jurisdictions may cause official traffic-control devices to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection, and when such devices are so placed no driver of a vehicle shall turn a vehicle at any intersection other than as directed and required by such devices."

Section 301.010, subsection (9) defines "highway" as used in these sections. That subsection provides:

"'Highway', any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality;"

Under Section 304.271, RSMo 1969, there is a statutory presumption that official traffic-control devices placed in position approximately conforming to the requirements of the law are presumed to have been so placed by the official act or direction of lawful authority.

Under Section 304.361, RSMo 1969, the violation of any of the provisions of these sections constitutes a misdemeanor.

It is our view then that the broad language of these sections confers authority upon the county court to exercise such control over roads under its jurisdiction. We assume that the roads in question are under the jurisdiction of the county court.

In our Opinion No. 315, dated September 24, 1969 to the Honorable John J. Johnson, copy enclosed, we concluded that these sections authorizing the establishment of such controls by the local governing body, including the county courts, were not unconstitutional as an impermissible delegation of legislative power.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 456
10/14/70, Meyer

Op. No. 315
9/24/69, Johnson

STATE BOARD OF EDUCATION: Review and certification of application
ELEMENTARY and SECONDARY of the State Board of Education for Grant
EDUCATION ACT OF 1965: under Title V of the Elementary and Second-
FEDERAL-STATE AGREEMENTS: ary Education Act of 1965, P.L. 89-10,
as amended.

June 29, 1971

OPINION LETTER NO. 368

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

FILED
368

Dear Dr. Mallory:

This is in answer to your request for our review and certification of the State Board of Education's Application for Grant to Strengthen a State Department of Education under the Elementary and Secondary Education Act of 1965, Title V, Section 503, P.L. 89-10, for fiscal year 1972.

It is the opinion of this office that the Missouri State Board of Education is the agency in this State primarily responsible for state supervision of public elementary and secondary schools, and, is the "state educational agency" as defined in Section 801(k) of Title VIII of Public Law 89-10 as amended; and that the State Board of Education has the authority under State law to submit an application for a grant pursuant to Section 503 of Title V, Public Law 89-10. See Section 161.092, RSMo 1967 Supp.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Very truly yours,

JOHN C. DANFORTH
Attorney General

LIQUOR:
SUNDAY SALES:

It is not necessary for a municipality, which allows the sale of liquor-by-the-drink, to pass an ordinance authorizing Sunday sales of liquor-by-the-drink where such sales are specifically provided for by the state Liquor Control Act. A municipality which allows the sale of liquor-by-the-drink cannot completely prohibit, by ordinance, the sale of liquor-by-the-drink on Sunday within that municipality where such sale is authorized by state law.

OPINION NO. 369

July 8, 1971

Honorable Dick B. Dale
Representative, District 83
610 East Main
Richmond, Missouri 64085



Dear Representative Dale:

This is in response to your request for an opinion concerning the sale of intoxicating liquor-by-the-drink on Sunday as authorized by the Liquor Control Act.

Specifically, you have asked us whether a municipality must authorize, by ordinance, Sunday sales of liquor-by-the-drink as provided for by Sections 311.298, RSMo 1969, and 311.097, Senate Bill No. 148, 76th General Assembly, which will become effective 90 days after the adjourning of the first regular session of the 76th General Assembly; and whether a municipality, by ordinance, may prohibit such sales.

Section 311.097, as enacted by the 76th General Assembly, provides for the licensing of "restaurant bars," as such term is described in that act, to sell intoxicating liquor-by-the-drink on Sunday between the hours of 1:00 p.m. and midnight, providing that such establishment meets the other qualifications set forth in Chapter 311 with respect to the sale of intoxicating liquor-by-the-drink. Section 311.298 provides that any person having a license to sell intoxicating liquor-by-the-drink may sell intoxicating liquor-by-the-drink on Sunday between the hours of 1:00 p.m. and "until the time which would be lawful on another day of the week" when such Sunday falls on December 31.

In our opinion, it is not necessary for a municipality, which has authorized the sale of liquor-by-the-drink, to pass an ordinance specifically authorizing the Sunday sales set forth in Section 311.298 and Section 311.097. The state Liquor Control Act specifically authorizes these sales on Sunday and would need no implementation by local ordinance.

Honorable Dick B. Dale

With respect to your second question, it is our opinion that a municipality, which has authorized the sale of intoxicating liquor-by-the-drink, cannot enact an ordinance completely prohibiting the sale of liquor-by-the-drink on Sunday if licensees within the municipality are otherwise qualified under the Liquor Control Act. Although Section 311.220, sub. 2, RSMo 1969, allows municipalities to make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, the section specifically provides that all such ordinances must not be inconsistent with the provisions of the state Liquor Control Act. Inasmuch as the legislature has authorized the sale of liquor-by-the-drink on Sundays under the circumstances outlined in Sections 311.298 and 311.097, a municipal ordinance completely prohibiting such sales would be inconsistent with state law and, therefore, invalid. See *City of St. Louis v. Klausmeier*, 112 S.W. 516, 518 (Mo. banc 1908) and *Vest v. Kansas City*, 194 S.W.2d 38 (Mo. 1946).

CONCLUSION

It is the opinion of this office that:

1. It is not necessary for a municipality, which allows the sale of liquor-by-the-drink, to pass an ordinance authorizing Sunday sales of liquor-by-the-drink where such sales are specifically provided for by the state Liquor Control Act.
2. A municipality which allows the sale of liquor-by-the-drink cannot completely prohibit, by ordinance, the sale of liquor-by-the-drink on Sunday within that municipality where such sale is authorized by state law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

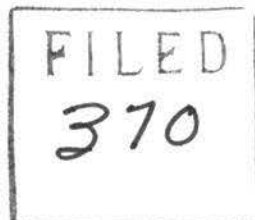


JOHN C. DANFORTH
Attorney General

July 1, 1971

OPINION LETTER NO. 370
Answer by Letter-Park

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to your request of June 25, 1971, and in accordance with the directive contained in Section 125.030, RSMo 1969, I hereby submit a ballot title for House Joint Resolution No. 13, 76th General Assembly, submitting to the qualified voters of Missouri an amendment repealing Section 11(b) of Article X of the Constitution of Missouri relating to taxation and adopting one new Section in lieu thereof relating to the same subject. The ballot title is:

Provides for maximum property tax rate of 35 cents per hundred dollars valuation in first class counties with an assessed valuation of \$300,000,000 or more.

Yours very truly,

JOHN C. DANFORTH
Attorney General

June 30, 1971

OPINION LETTER NO. 371
Answered by Klaffenbach

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to your request of June 25, 1971 and the provisions of Section 125.030, RSMo 1969, I submit the following ballot title in relation to House Joint Resolution No. 35 of the 76th General Assembly (Amendment to Section 19 of Article IV of the Missouri Constitution):

Eliminates provision in state merit system that veterans preference be given only to veterans who were Missouri citizens on entering United States armed services.

Very truly yours,

JOHN C. DANFORTH
Attorney General

July 8, 1971

OPINION LETTER NO. 372
Answer by letter- C.A. Blackmar

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to Section 125.030, the official ballot title for the constitutional amendment proposed by House Joint Resolution No. 24, 76th General Assembly, is:

Permits city of over five thousand population, and other cities as may be provided by law, to adopt charter with approval of voters of such city; provides charter cities have all powers which the legislature can confer on any city consistent with the constitution, statutes and the charter.

Yours very truly,

JOHN C. DANFORTH
Attorney General

June 30, 1971

OPINION LETTER NO. 373
Answer by Letter - Nowotny

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to your request of June 25, 1971, and pursuant to the directive found in Section 125.030, RSMo, I hereby submit a ballot title for House Committee Substitute for House Joint Resolution No. 27, 76th General Assembly, an amendment to Article III of the Constitution of Missouri adding one new section to be known as Section 37(b). The ballot title is:

Authorizes issuance of bonds not exceeding \$150,000,000 for control of water pollution by providing funds for sewage treatment facilities by counties, municipalities and sewer districts.

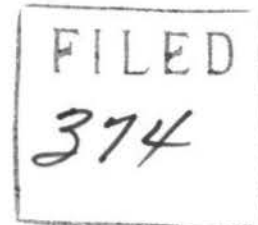
Yours very truly,

JOHN C. DANFORTH
Attorney General

July 1, 1971

OPINION LETTER NO. 374
Answer by Letter-Wieler

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to your request of June 25, 1971, and pursuant to the directive found in Section 125.030, RSMo 1969, I hereby submit a ballot title for House Committee Substitute for House Joint Resolutions No. 6 and 14, 76th General Assembly, an amendment repealing Section 39 of Article III of the Constitution of Missouri relating to the General Assembly and adopting one new section in lieu thereof relating to the same subject. The ballot title is:

Allows the authorization by law of pari-mutuel wagering on horse racing.

Very truly yours,

JOHN C. DANFORTH
Attorney General

BANKS:

BRANCH BANKING:

A corporation which is not organized as a bank or trust company does not engage in improper branch banking, in violation of Section 362.105(1), RSMo 1969, by owning a controlling interest in the shares of two or more banks or trust companies organized under Chapter 362, RSMo 1969, or predecessor statutes, so long as each bank or trust company is operated and maintained as a distinct financial entity.

OPINION NO. 375

July 27, 1971

Mr. Herman W. Huber, Chairman
State Banking Board
101 East High Street
Jefferson City, Missouri 65101



Dear Mr. Huber:

This official opinion is issued in response to your request of June 25, 1971, in which you inquire about the validity of the acquisition by "bank holding companies" of the stock of banks, in sufficient proportion to have control of the banks.

Section 362.105(1), RSMo 1969, provides in part as follows:

" . . . no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house . . . "

There is an exception with regard to the maintenance of a single drive-in facility within the provisions of Section 362.107, RSMo 1969.

Other important statutory provisions are as follows:

Section 362.415(2), RSMo 1969, provides as follows:

"No corporation, domestic or foreign, other than a national bank or a federal reserve bank, unless expressly authorized by the laws of this state, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, or issuing notes or other evidences of debt to be loaned or put into circulation as money."

Section 362.420, RSMo 1969, provides as follows:

Mr. Herman W. Huber

"No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of the state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any form of banking."

We understand that corporations are active in Missouri whose purpose includes the acquisition and ownership of stock in banks and trust companies, organized under Chapter 362 of the Missouri Revised Statutes and its predecessor statutes, or corporations organized under the national banking laws and doing business in Missouri. Corporations of this kind are commonly referred to as "holding companies." They are not organized under the banking laws. Some are organized under Chapter 351, RSMo 1969 (the "General and Business Corporation Act of Missouri"), and some may be organized under the laws of other states.

The specific problem you present would arise if a "holding company" owned a majority of the capital stock of two or more corporations organized as "banks" or "trust companies." We will refer to the latter as the "subsidiary banks."

In rendering our opinion, we assume that there are no violations of the explicit provisions of Chapter 362, RSMo 1969. In particular we assume: (a) that the holding company is validly organized under Chapter 351, RSMo 1969, or some other statutes not providing for the organization of banks; (b) that each of the subsidiary banks operates within such restrictions as those of Section 362.170(1), RSMo 1969, as to loan limits and Section 362.210, RSMo 1969, as to reserves; (c) that the name of the "holding company" does not indicate that the corporation exists or has authority to act as a bank or trust company; (d) that the directors of the subsidiary banks meet the qualifications of Section 362.245, RSMo 1969, as to residence and stock holdings; (e) that the holding company does not purport to engage in any of the transactions described in Section 362.415(2) or Section 362.420, RSMo 1969, for its own account; (f) that neither the holding company nor any subsidiary bank accepts deposits or pays checks on behalf of any other subsidiary bank.

We also proceed on the assumption that some or all of the following circumstances may be present: (a) the holding company and

Mr. Herman W. Huber

the subsidiary banks may advertise their affiliation and common ownership; (b) the names of some or all of the subsidiary banks may be similar, differing perhaps only as to the name of the place of operation; (c) that the holding company votes its stock so as to control the election of the board of directors of each subsidiary bank; (d) that the same individuals may be directors of the holding company and of some or all of the subsidiary banks; (e) that the subsidiary banks maintain deposit accounts with each other and draw or sell drafts on these accounts; (f) that a subsidiary bank may obtain the participation of another subsidiary bank in a loan to one of its customers, when the proposed loan is in excess of the initiating bank's limit or is otherwise inconvenient, and with the obligation to each bank separate and distinct in form and obligation; (g) that a subsidiary bank may receive advice or services from another subsidiary bank, either gratuitously or for a consideration. We do not consider that these circumstances, individually or in the aggregate, would affect the conclusion we reach, but we set them out here because they may give rise to some question.

We expressly reserve, however, the question of the effect of the holding company's or subsidiary bank's representation to the public that they act together on banking or trust business.

In rendering our opinion, we confine ourselves to the Missouri statutes. We specifically exclude consideration of the following:

(1) The Bank Holding Company Act in Title 12, United States Code. We assume that there has been any required compliance with the terms of this act and other federal statutes which may be applicable.

(2) Any question of monopolization or restraint of trade under the federal or state antitrust laws. See annotation 83 A.L.R.2d 374.

The question is whether a bank holding company is engaging in branch banking, in violation of Section 362.105(1), RSMo 1969, in obtaining and maintaining majority ownership and effective control in two or more subsidiary banks operating within Missouri at different location.

The Missouri statutes are explicit in prohibiting branch banking. There are, however, no specific regulations on the ownership of stock in banks. In deciding whether to approve an application from a proposed new bank, the responsible authorities may give consideration to the qualifications of the principal owners; but, once a bank or trust company is organized, there are no restrictions on the transfer of its shares. Section 362.073, RSMo 1969, requires the reporting of certain transactions affecting the control of banks

Mr. Herman W. Huber

through stock ownership, and, by requiring only reporting, would appear to sanction the acquisition of controlling interests provided the required reports are made. Nor are there any expressed restrictions on the ownership by the same individual, or group of individuals, of the controlling interest in any number of banks. We may say, in general, that acquisition of stock in banks and trust companies is not restricted by Missouri law.

The Missouri statutes do not distinguish between ownership of shares by individuals and ownership by corporations. The ownership of bank stock is clearly included within the provisions of Section 351.385(6), RSMo 1969, which gives corporations organized under the General and Business Corporation Law very broad power to acquire and own the shares of other corporations. A business corporation could not acquire all the stock of a bank or trust company, since there must be directors' qualifying shares as provided in Section 362.245, RSMo 1969, but there is no other limit.

Chapter 362, RSMo 1969, contains substantial restrictions on the stock ownership by banks and trust companies in other corporations, but we need not consider these here since we are not concerned with shares held by banks. Our concern is with the holding of stock of banks.

It is also important to observe the specific provisions of Missouri statutes with regard to "holding companies" in the ownership of shares of railroad and street railroad companies (Section 387.260, RSMo 1969); telephone and telegraph companies (Section 392.300(2), RSMo 1969); and utility companies (Section 393.190(2), RSMo 1969)). These statutes contain specific restrictions on the holding by one corporation of controlling or substantial interests in the stock of another corporation or corporations engaged in the particular type of business in question. There are no comparable restrictions which refer to banks or trust companies or their stock.

The holding company device, then, is not illegal on its face. The holding company maintains its corporate identity. Each of the subsidiary banks does also. The transactions of each are separate and distinct. If the holding company arrangement is to be found to be invalid, then, there must be a disregard of the corporate entity, so as to hold that the holding company is engaged in business at each location at which a subsidiary bank has its office.

We find no Missouri cases which rule the precise point. Prohibitions on bank branches are quite common in the United States, and we find quite a few decisions from other states on the application and effect of branch banking statutes which seem to be entirely comparable to Missouri's. These hold, with a great degree of uniformity, that the ownership of stock in two or more banks by

Mr. Herman W. Huber

the same person or group of persons, in and of itself, does not make the banks branches of each other.

A leading case which specifically involves the holding company device is *First National Bank in Billings v. First Bank Stock Corporation*, 306 F.2d 937 (9th Cir. 1962). The court held that two banks were not branches simply because the same holding company owned the controlling interest in each of them. It made no difference that the banks participated in loans together and acted as correspondents, or that one handled clearings for the other.

This case was cited and followed in *Goldy v. Crane*, 445 P.2d 212 (Colo. banc 1968) and *Nemirow v. Bloom*, 445 P.2d 214 (Colo. banc 1968). These cases, decided the same day, dealt with the ownership by a holding company of controlling interest in the shares of as many as five banks. The court observed that each of the subsidiary banks was ". . . a separate operational entity, both legally and functionally," and that the branch banking statutes did not forbid the arrangement.

Another case in point is *Clearfield State Bank v. Brigham*, 24 Utah 2d 339, 471 P.2d 161 (1970).

Camden Trust Company v. Gidney, 301 F.2d 521 (App. D.C. 1962), involved a situation in which a bank had sought to establish a branch and had been denied permission because of the restrictions of state law, which permitted branches in limited circumstances. The majority stockholders and directors of the bank then applied for and obtained a charter for a new national bank, to operate at the same location as had been proposed for the branch. By federal law a national bank may not establish a branch under circumstances in which a state bank could not do so. The court held, however, that the institution of a new bank did not constitute the operation of a branch, even though the beneficial ownership was substantially the same. The creation of the separate banking corporation was not considered to be an evasion of the restrictions against branch banking, even though the occasion for it was the denial of permission to operate a branch.

Other cases holding that the ownership of stock in more than one bank by the same person or group does not constitute branch banking are *In re Application of Kenilworth State Bank*, 49 N.J. 330, 230 A.2d 377 (1967); *Daniel v. Best*, 224 Iowa 1348, 279 N.W. 374 (1938); and *Whitney National Bank in Jefferson Parish v. James*, 189 So.2d 430 (La. 1966). This last case arose in a state which had specific regulation of bank holding companies (which, of course, Missouri does not have). The court held that the statutes regulating holding companies were not to be extended by implication to situations in which the same individuals owned stock in several banks.

Mr. Herman W. Huber

The problem is discussed in 23 A.L.R.3d 683; Fletcher, Cyclo-
pedia of Corporations, Vol. 6, Section 2539.3; Vol. 6A, Section
2821.

We have given careful attention to the case of Metropolitan Holding Co., Inc. v. Snyder, 79 F.2d 263 (8th Cir. 1935), which held that stockholders of a national bank could not avoid the individual double liability then imposed by the governing statutes, by placing their shares in a holding company. The court pointed to the specific statutory provision imposing double liability for the protection of depositors and other creditors, and held that the individuals continued to be liable even though they placed ownership of their stock in the holding company. The opinion did not conclude that the holding company arrangement was otherwise unlawful or evasive. The case, furthermore, involved the application of federal law rather than Missouri law even though it arose in a Missouri setting. The court found a statutory policy in double liability, which it held could not be avoided by an incorporation. We do not believe that it is persuasive in the present inquiry, in view of the many closer cases.

The Missouri courts consistently hold that corporate entities will be given effect in the absence of compelling circumstances. The mere common ownership of stock, or interlocking of directorates, is not sufficient cause to disregard the corporate entity. Eisenbarth v. Equity Mut. Ins. Co., 189 S.W.2d 168 (St.L.Ct.App. 1945).

State v. Shell Pipe Line Corporation, 345 Mo. 1222, 139 S.W.2d 510 (1940) involved an oil corporation which did local business in Missouri. It formed a pipe line company as a wholly owned subsidiary. The pipe line company did not do local business in Missouri. Its operations, rather, were wholly in interstate commerce. On this basis, it was claimed that the operations of the pipe line company could not be considered in determining the Missouri corporation franchise tax for the oil corporation. The court sustained the contention, on the basis that the pipe line company's operations were separate and distinct from those of the parent company. This result was reached even though the operation of the pipe line subsidiary was convenient for the parent in the carrying on of its regular business. The case stands for the proposition that a corporation may organize a subsidiary, with the rights of a separate legal person, so long as the business and property of the subsidiary is maintained discretely and independent of the parent.

The case of Turpin v. Chicago, Burlington & Quincy Railroad Company, 403 S.W.2d 233 (Mo. banc 1966) indicates that the Missouri courts maintain the general policy of respecting the corporate entity.

Mr. Herman W. Huber

We believe that the Missouri courts would follow the cases from other jurisdictions in holding that the mere ownership by a holding company of controlling stockholdings in several banks or trust companies does not constitute illegal branch banking. The Missouri statutes do not indicate substantial reason for departing from the usual policy of respect for the corporate entity. We note particularly the absence of restriction on concentration of ownership in banks, and the presence of specific regulation of holding companies in other fields. The statutory policy against branch banking is apparently intended to control the size of individual banks, by limiting each to the deposit potential of a specific location. It is difficult to find a policy against concentration of ownership, when the means for concentrating ownership is provided by law. We note the specific provisions of Section 362.415 (2), RSMo 1969, prohibiting a corporation which is not a bank being "in any way interested in a fund." If a holding company and its subsidiaries are distinct as to business or property, then there is no "fund" maintained by the holding company in violation of Section 362.415(2), RSMo 1969. The holding company, rather, has ownership of shares, in subsidiaries which may maintain "funds." We believe that the legislature would have been more specific if it had intended to inhibit the ownership of bank shares by non-banking corporations.

If the holding company and the subsidiary banks were to commingle their assets and obligations, or incur joint and several liability to customers, then a different problem might be presented. In determining whether to give effect to the corporate entity, the Missouri courts seem to place great emphasis on the separation of corporate business and property. Individuals are allowed the privileges of incorporating and maintaining a separate legal entity, if they treat the corporation as a separate entity. In this connection we note that banks and trust companies are subject to detailed examination by state and federal authorities. It would be expected that this examination would determine whether there was any improper commingling of a bank's assets with those of another bank or of a holding company.

CONCLUSION

It is, therefore, the opinion of this office that a corporation which is not organized as a bank or trust company does not engage in improper branch banking, in violation of Section 362.105 (1), RSMo 1969, by owning a controlling interest in the shares of two or more banks or trust companies organized under Chapter 362, RSMo 1969, or predecessor statutes, so long as each bank or trust company is operated and maintained as a distinct financial entity.

Mr. Herman W. Huber

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" following in a similar style.

JOHN C. DANFORTH
Attorney General

August 16, 1971

OPINION LETTER NO. 377
Answer by letter-Jones



Honorable Barnes Griffith
Prosecuting Attorney
Dade County Courthouse
Greenfield, Missouri 65661

Dear Mr. Griffith:

This letter is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Section 52.280 provides that County Collectors in Counties of the third and fourth classes may retain certain fees pursuant to 52.260 and 52.270 V.A.M.S. for the payment of deputy and clerical hire, said sum not to exceed seventy per-cent of the maximum amount of fees and commissions which said Officer is permitted to retain by the foregoing sections. It is provided in said Section that said deputy and clerical hire is payable out of fees and commissions earned and collected by the Officer only and not from the General Revenue. Section 52.260 cited aforesaid, sub-section 13 fits the circumstances of Dade County and the Treasurer Ex-Officio Collector thereof.

"The legal question is as follows: Does Article 7, Section 6 of our State Constitution, which relates to nepotism, preclude our ex-officio collector from paying his wife for clerical work out of the fees and commissions which he is permitted to retain for clerical hire pursuant to the above mentioned Statutes?"

Honorable Barnes Griffith

Section 6 of Article VII, Missouri Constitution of 1945, provides as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The above section indicates that there are three necessary elements which must exist before there has been a violation of said section. First, the party to be charged must be a public officer or employer in this state. Secondly, he must name or appoint, by virtue of his office or employment, some party to public office or employment. Thirdly, the party named or appointed must be a relative within the fourth degree either by consanguinity or affinity.

It is our view that the above elements exist in the factual situation presented in the opinion request. It has been held that a county court judge, a mayor, and a member of a school board come within the above-quoted section. See *State ex inf. Stephens v. Fletchall*, 412 S.W.2d 423 (Mo. banc 1967), *State ex inf. Ellis ex rel. Patterson v. Ferguson*, 333 Mo. 1177, 65 S.W.2d 97 (1933), certiorari denied *Ferguson v. State of Missouri ex inf. Ellis*, 54 S.Ct. 559, 291 U.S. 682, 78 L.Ed. 1070, and *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.2d 100 (banc 1933). It was also held in *State ex inf. Norman v. Ellis*, 325 Mo. 154, 28 S.W.2d 363 (banc 1930) that clerks of county and circuit courts appointing wives as deputies forfeited their offices since their wives were related by affinity within the constitutional provision.

The question remains, however, as to whether or not there would be a violation of the anti-nepotism section by the ex-officio collector paying his wife for clerical work out of fees and commissions which he is permitted to retain for clerical hire pursuant to statute.

In Opinion of the Attorney General No. 72, Pryer, 9-26-45, the issue was whether a sheriff paid entirely by fees resulting from the performance of his duties, could legally appoint his son as deputy sheriff, with the understanding that the deputy's remuneration would come entirely from the funds of the sheriff. The holding of the opinion was that the arrangement was in violation of Section 6 of Article VII, Missouri Constitution of 1945, as it was not necessary that the relative who was appointed receive compensation in any manner. It was further pointed out that Section 6 of Article VII, Missouri Constitution of 1945, was violated by the appointment and not by the fact that he was to receive compensation (copy of opinion attached).

Honorable Barnes Griffith

In Opinion of the Attorney General No. 13, Butler, 5-13-53, it was held that a county collector was not guilty of violating Section 6 of Article VII, Missouri Constitution of 1945, by permitting his wife to render to him personal service where the wife was not holding an official position nor rendering service to the state (copy of opinion attached). It should be noted, however, that the following comment was made on page three of the opinion:

"You do not state in your request, and therefore we must assume for the purpose of this opinion, that the person to whom you refer is not to be employed as a statutory clerk or deputy in any sense. We assume that such person will merely be assisting the officer personally; that she will not take an oath of office or perform, either in her own name or in the name of the officer, any of the duties of a statutory clerk or deputy. . . ."

For the above reasons, it is our opinion that Section 6 of Article VII, Missouri Constitution of 1945, which relates to nepotism, prohibits the treasurer and ex-officio collector of a third class county from paying his wife for clerical work out of fees and commissions which he is permitted to retain for clerical hire pursuant to Section 52.280, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 72
9-26-45, Pryer

Op. No. 13
5-15-53, Butler

COMPENSATION:
APPROPRIATIONS:
DIVISION OF FINANCE:
CONSTITUTIONAL LAW:

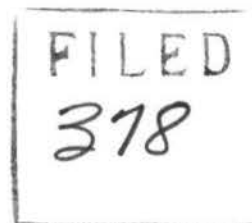
The Commissioner of Finance is to set the compensation of employees of the Division of Finance, other than the Commissioner and Deputy Commissioner, at amounts he shall

determine notwithstanding the language of Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly purporting to limit the amount salaries may be increased.

OPINION NO. 378

July 21, 1971

Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
12th Floor Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to the request of your predecessor in office, C. W. Culley, for an opinion on the authority of the Commissioner of Finance to set the salaries of employees of the Division of Finance other than those of the Commissioner and the Deputy Commissioner. Section 361.090, RSMo 1969, provides as follows:

"1. The commissioner of finance shall receive an annual salary of eighteen thousand dollars and the deputy commissioner of finance shall receive an annual salary of sixteen thousand dollars. The salaries of the other employees of the division shall be fixed from time to time by the commissioner of finance.

"2. All of the salaries shall be paid in equal monthly installments out of the state treasury as provided by law.

"3. In addition thereto the actual and necessary traveling and other divisional or office expenses of the commissioner of finance, the deputy commissioner of finance, the other assistants herein provided for, examiners and other appointees of the commissioner of finance, provided by law, shall be paid out of the state treasury as provided by law."

Mr. H. Duane Pemberton

Looking at that section alone, it is quite clear that the salaries of employees of the Division of Finance, other than the Commissioner and Deputy Commissioner, are to be set by the Commissioner. However, an appropriation act for the fiscal year beginning July 1, 1971, Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly provides in part as follows:

"There is appropriated out of the State Treasury, chargeable to the fund and for the purpose designated, for the period beginning July 1, 1971 and ending June 30, 1972, as follows:

* * *

"Section 4.420. To the Division of Finance

"*Personal Service \$896,387

"Additions 1,470

"Repairs and Replacements. 3,297

"Operation 250,000

"From General Revenue. \$1,151,154"

The asterisk included in that section refers to the end of the act wherein it is stated:

"*PERSONAL SERVICE (Non-Merit Employees)

"The intent of the Personal Service appropriation is to allow a 15% increase for employees receiving less than \$5400 per year; a 10% increase for employees receiving \$5400 to \$6888 per year; and a 5% increase for employees receiving \$6888 to \$8400 per year. All employees that are not statutory and that are not included in the above scale are allowed a \$300 per year increase only."

It would thus appear that the legislature in the appropriation act intended to restrict the power of the Commissioner of Finance to set the salaries of the employees of his division and the question becomes: Has the legislature passed a valid law for that purpose? We are of the opinion that the appropriation bill does not validly limit the power of the Commissioner of Finance under Section 361.090, RSMo 1969, to set the compensation to be received by

Mr. H. Duane Pemberton

the employees of the Division of Finance. Opinion No. 10 to I. T. Bode, Director of the Missouri Conservation Commission, June 11, 1953, a copy of which is enclosed, is directly in point. There we held:

"The law is well established in this state that the General Assembly cannot legislate by an appropriation act. Legislation of a general character cannot be included in an appropriation bill. To do so would violate the provisions of the Constitution of Missouri, namely, Section 23, Article III, . . . which . . . reads:

'Limitation of scope of bills -- contents of titles -- exceptions.-- No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.'"

Consequently, the above-referred to opinion held that the legislature cannot in an appropriation act limit the power of the Conservation Commission to expend funds for certain purposes when the expenditure of funds for those purposes is otherwise within the Commission's authority. The fact that the Conservation Commission's power to expend moneys was provided for in the Constitution while the power of the Commissioner to set salaries is provided by statute is of no moment. The general rule still remains that the legislature cannot legislate in an appropriation act. State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. banc 1938), reversed on other grounds 305 U.S. 337. To find that the legislature in an appropriation act may limit the amount of compensation that may be paid to employees of the Division of Finance, notwithstanding the general law that the Commissioner is to make such a determination would be to find the legislature has legislated in an appropriation act in such a fashion as to repeal Section 361.090, RSMo 1969. Such a holding would run contrary to Article III, Section 23 of the Constitution of the state.

The authorities cited in Opinion No. 10, June 11, 1953, as well as that opinion itself, hold that valid and invalid portions of an appropriation bill are separable. Therefore, the part of Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly purporting to limit the amount of increase in salary that

Mr. H. Duane Pemberton

may be provided for Division of Finance employees is invalid; but the portion of the bill setting forth the specific appropriation for the Division of Finance is valid.

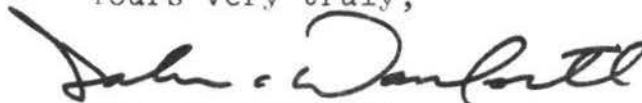
We hold that the Commissioner of Finance may set the salaries of employees of the Division of Finance, except for the Commissioner and Deputy Commissioner, without regard to the note at the end of Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly limiting increases to certain state employees, so long as the total expenditure for salaries during the fiscal year does not exceed the amount for personal services set forth in Section 4.420 of the said bill.

CONCLUSION

It is the opinion of this office that the Commissioner of Finance is to set the compensation of employees of the Division of Finance, other than the Commissioner and Deputy Commissioner, at amounts he shall determine notwithstanding the language of Conference Committee Substitute for House Bill No. 4 of the 76th General Assembly purporting to limit the amount salaries may be increased.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 10
6-11-53, Bode

August 31, 1971

OPINION LETTER NO. 380
Answer by Letter-Klaffenbach

Mr. Dexter D. Davis
Commissioner of Agriculture
Post Office Box 630
Jefferson City, Missouri 65101



Dear Mr. Davis:

This letter is in response to your opinion request in which you ask whether it is legal and proper for the Commissioner of Agriculture to enter into the agreement entitled "AGREEMENT RELATING TO BRAND REGISTRY" with the Missouri Cattlemen's Association.

You further state that:

"The Missouri Legislature passed and the Governor has signed House Bill #134 a copy of which is attached and marked Exhibit "B". This Bill requires the Commissioner of Agriculture to register all cattle brands filed with the Department of Agriculture. The General Assembly [sic] did not appropriate any money to accomplish this task. The Missouri Cattlemen's Association would like to handle the brand registration as per the attached agreement (Exhibit A). They are willing to modify that agreement so as not to charge for this service until such time as appropriations may be secured from the Legislature."

We understand that House Substitute for House Bill No. 134 was signed by the Governor June 15, 1971, and will be effective September 28, 1971.

Mr. Dexter D. Davis

The Bill referred to provides a comprehensive scheme for the registry of marks and brands of animals and repeals Chapter 268, RSMo 1969. We will refer to the Bill in pertinent part as it relates to the proposed agreement.

The preamble of the agreement recognizes the passage of said Bill and notes that it vests certain responsibilities and duties relating to the registration of livestock brands in the Missouri Department of Agriculture and declares that it would be of mutual benefit to the Department of Agriculture and the livestock industry to enter into an agreement with the Missouri Cattlemen's Association and their employees to register and record brands.

Notably the agreement provides among other things, that the Association agrees to perform duties delegated to it by the Department of Agriculture, maintain records and other materials, render accountings and pay funds received by it to the Department for deposit into general revenue, to furnish necessary office space, equipment, utilities and the like as well as personnel to administer the brand registry program and to publish a brand registration book and supplements.

Some of the provisions of the agreement appear to lack clarity such as the provision requiring the Association to protect the ownership of all brands currently and hereafter registered and, as we have indicated previously, the provision relating to the delegation of unspecified duties.

The new brand registry laws vest certain definite functions and duties in the Commissioner of the Department of Agriculture. That is, under Section 4, the Commissioner accepts brand applications with the filing fees and makes the determination as to whether the brands are of record or conflict with other brands and has the duty to file brands pending examination. That section specifically states that the power of examination, approval, acceptance or rejection shall be vested in the Commissioner, subject to the provisions of Chapter 536, RSMo. Under Section 6, the Commissioner is required to furnish the owner of recorded brands certified copies of the record of the brand. Under Section 10, instruments of writing evidencing the sale, assignment or transfer of the brand are required to be recorded by the Commissioner and under Section 11, the Commissioner must furnish a new owner certified copies evidencing such transactions.

Under Section 12, such certified copies are prima facie evidence of the ownership of the animal. Under Section 13, it is the duty of the Commissioner to cause to be published in book form a list of all brands on record at the time of publication. The Commissioner further has the duty under that section to distribute copies of the brand book and supplements to the county recorder of deeds of each county and to each licensed livestock market and slaughter plant in the state.

Mr. Dexter D. Davis

Section 14 requires that the Commissioner deposit the fees collected under the act in the general revenue.

Without going into all the provisions of the act, it is clear that the entire administration of the act is vested in the Commissioner and it is his duty to file, record and make other determinations with respect to brands.

As we have noted the agreement does not clearly specify which duties will be delegated to the Missouri Cattlemen's Association. It appears however, that the agreement is an attempt to delegate the major portion of the execution and responsibility of the laws relating to brand registry to a private organization even though the Department of Agriculture maintains a certain amount of control. Assuming that the delegation of authority will likely correspond with the intentions of the parties upon entering into this agreement, we are of the view that the result is to purport to give the private association many of the powers and duties the legislature specifically vested in the Commissioner. Accordingly, we believe that the agreement is an improper attempt to place sovereign functions, notwithstanding controls, in the private organization.

The Supreme Court of Missouri held that, in the area of the exercise of an officer's authority, an officer to whom a discretion is entrusted cannot delegate the exercise of that discretion although he may under proper circumstances delegate the performance of a ministerial act. State ex rel. Skrainka Const. Co. v. Reber, 226 Mo. 229, 126 S.W. 397 (1910). In this respect the Court has also noted that an act which an officer may do or may not do in the exercise of his official discretion cannot be considered a ministerial action. State ex inf. Gentry v. Toliver, 315 Mo. 737, 287 S.W. 312 (1926).

It is clear that these laws are expressly designed for the protection of the public and the agreement as such which contemplates unspecified delegation of duties, the maintenance of public records and the collection and handling of public funds by a private organization is contrary to the law and to accepted standards of public administration.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ELECTIONS: A student of eighteen years of age or over
MINORS: meeting the necessary constitutional and
VOTERS: statutory requirements for voting may:
RESIDENCE: 1) Retain his original residence and register
and vote at such place. 2) Establish a residence in a different community and register and vote at such place if, a) The student declares that he has abandoned his original residence and that he does not intend to return to such place; and, b) He declares his intent to establish a residence in the community in which he resides for an indefinite period; and c) Such declarations are consistent with facts which show that such voter has abandoned his original residence and intends to reside in such community.

September 3, 1971

OPINION NO. 387

Honorable Charles S. Broomfield
Representative, District 87
4801 No. Lister
Kansas City, Missouri 64119



Dear Representative Broomfield:

This letter is in response to your opinion request in which you ask:

"Where must college students legally register and vote in Missouri?"

We understand that you are primarily concerned with the factors to be considered in determining the "residence" of voters under twenty-one years of age.

Section 2 of Article VIII of the Constitution of Missouri provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. Citizens of the United States who are otherwise qualified to vote under this section and who have resided in this state sixty days or more, but less than one year, prior to the date of a presidential election may be permitted by law to vote

for presidential and vice presidential electors at such election but for no other officers. No idiot, no person who has a guardian of his or her estate or person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting. All persons voting for the presidential and vice presidential electors under the sixty day resident provision shall sign an affidavit as to their eligibility to vote under said section, and any person who falsifies said affidavit shall, upon conviction, be deemed guilty of a felony."

Section 111.021, RSMo 1969, with respect to the qualification of voters generally states:

"Only citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, shall be entitled to register and vote at all elections by the people. Each voter shall vote only in the township or election district in which he resides, or if in a town or city, then in the election district or precinct in which he resides. No person who is adjudged incompetent or while confined in any public prison shall be entitled to register and vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to register and vote at any election unless he has been granted a full pardon by the properly authorized state or federal authority."

As you have noted in your opinion request, the minimum age requirement for voters has been changed to eighteen years of age by the adoption of the Twenty-sixth Amendment to the United States Constitution. This Amendment provides:

"SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Honorable Charles S. Broomfield

"'SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.'"

I

A student who attends school away from home does not thereby automatically abandon the residence he had previously nor does he automatically establish a residence at the place where he resides while attending school. Residency depends upon intent.

Section 6, Article VIII of the Missouri Constitution provides as follows:

"For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while engaged in the civil or military services of this state or of the United States, or in the navigation of the high seas or the waters of the state or of the United States, or while a student of any institution of learning, or kept in a poor house or other asylum at public expense, or confined in public prison."

In interpreting this Constitutional provision, the St. Louis Court of Appeals in Chomeau v. Roth, 72 S.W.2d 997 (1934), a case involving the question of residency of student voters who had reached their majority, held at l.c. 999:

"The fact that the challenged voters were students is in and of itself not at all decisive of the case. Our Missouri Constitution provides in article 8, § 7 (Const. art. 8, § 7, p. 677, Mo. St. Ann.), that for the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or to have lost it by reason of his absence, while a student of any institution of learning. So the Constitution leaves the student much as it finds him, permitting him either to retain his original residence for voting purposes, or to take up a residence wherever his school is located if he so elects. In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home; the whole question, as in all similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in the light of all the facts and circum-

stances of the case. Hall v. Schoenecke, 128 Mo. 661, 31 S.W. 97; Goben v. Murrell, 195 Mo.App. 104, 190 S.W. 986, 197 S.W. 432.

"[3,4] The two cited cases, and particularly the former, control this case in all essential respects. As they announce the law, it is entirely possible for a student to gain a residence at the place where he is attending school, although he may have gone there for no other purpose than to attend school; the question of whether a change of residence is effected depending upon the intention with which the removal from the former residence was made. A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning there- to when his purpose has been accomplished, will not constitute such a change of residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile. Nolker v. Nolker (Mo. Sup.) 257 S.W. 798; Finley v. Finley (Mo. App.) 6 S.W.2d. 1006.

"[5] Now in this case, when the students entered the seminary, they at least came, so there was evidence to show, with the fixed intention of not resuming their respective residences at their former homes after graduation. Upon enrolling at the seminary they knew only that they were abandoning their former residences, and that they would reside at the seminary, not permanently, but for an indefinite time, depending upon the promptness with which they might complete the course, and upon whether they might subsequently take the postgraduate course. The abandonment of the former residence is the important factor; and the necessity of ultimate removal from the seminary should not affect the result. If, as the evidence shows, upon matriculation at the seminary the students abandoned their former residences, entering the school with the fixed intention of not returning to their original homes permanently, are they to be disfranchised from thenceforth until they acquire a residence after graduation? We think not. Rather,

the policy of the law is to construe election laws liberally in aid of the right of suffrage.

"And in this view of the case, not only had the particular students abandoned their former residences upon entering the seminary, as there was evidence to disclose, but they presented themselves as voters at the proper precinct in the city of Clayton, declaring to the election officials in charge thereof that they regarded the seminary as their place of residence. We grant that such statements on their part were not conclusive upon the question of their intention, but the evidence thereof, together with the other matters we have heretofore dwelt upon as significant, amply warranted the trial court in finding, as it did, that they were qualified to vote. If, as is said in *Goben v. Murrell*, supra, residence for voting purposes must have some connection or identification with the community, such connection or identification could not better be evidenced than by a participation in the community's public affairs by those who claim no other community as their residence."

It is our view that the principles set forth in *Chomeau v. Roth* are applicable to students between the ages of 18 and 21 as well as those 21 and over.

II

Generally speaking, a person resides where his family permanently resides.

In this respect, the Springfield Court of Appeals in *Clarkson v. MFA Mutual Insurance Company*, 413 S.W.2d 10 (1967) stated at l.c. 13-14:

". . . In this connection, we note also that our General Assembly has declared that '[a]s used in the statutory laws of this state * * * "[p]lace of residence" means the place where the family of any person permanently resides in this state, and the place where any person having no family generally lodges' [V.A.M.S. §1.020 (9)], and that the St. Louis Court of Appeals has pointed out that this statutory definition 'merely codifies the presumption of law that would in any event exist without it.' State upon Inf. of Reardon, supra, 388 S.W.2d at 58. . . ."

As indicated by the court above, the quoted statutory provision is simply the codification of a presumption; and as the presumption that a person's residency follows that of his family is not conclusive, the student's residency may be otherwise evidenced by the facts of the particular case. Such other evidence necessarily includes the subjective intent of the person as shown by his declaration of residency as well as other varied objective indicia of residency.

III

A student, although under twenty-one years of age, may establish a residence for himself apart from his family and abandon his former place of residence.

While we have not lost sight of the common law doctrine of servitude which proclaims that until a minor is emancipated his legal residence is ordinarily the same as that of his father (or mother if a legal custody situation is present), Beckmann v. Beckmann, 218 S.W.2d 566 (1949), it is our view that by reason of the provisions of the Twenty-sixth Amendment a minor voter is sui juris and has the capacity to form the intent requisite to establish a place of residence of his own. Emancipation at common law resulted from an agreement by the parent and the child that the child could go his own way and provide for himself and was express or implied; Spurgeon v. Missouri State Bank, 151 F.2d 702 (8th Cir. 1945) Wurth v. Wurth, 313 S.W.2d 161 (1958). However, it is our view in the premises that neither parental control nor parental support precludes such a student from establishing his own place of residence.

IV

Certain factors are to be considered in determining residence.

We recognize the difficulty in prescribing a precise formula for determining residency. See Clarkson v. MFA Mutual Insurance Company, above. However, we believe that a change in residence is effected by:

a) A bona fide abandonment of the original residence and an intent not to return to it coupled with an intent to remain in the new community indefinitely and physical presence in the new locality. As observed in Chomeau v. Roth, above, "indefinitely" does not necessarily mean forever but can be for that period of time necessary to accomplish the objectives at the college with an intent not to return to the previous residence.

b) Other circumstances supporting or disproving the students residency intention may be considered. That is, whether a student (or any person) has established his residence at a

place differing from his last residence depends upon all the facts and circumstances of the case. As stated by the Missouri Supreme Court in Hall v. Schoenecke, 31 S.W.97 (1895): "The fact that he is supported and maintained by his parents, and spends his vacation with them, are strong, but not necessarily conclusive, circumstances to prove that he has not changed his residence....The question is, as in other cases, largely one of intention, though, as to this, the evidence of the party himself is not necessarily conclusive...." The same rules for determining residency apply to students as to other persons. 29 C.J.S. Elections, § 22, p. 80.

The question of intent is to be gathered largely from the acts and the utterances of the person whose residence is under question and the declarations of such person made before, at, and after the time the residence in dispute is alleged to have been established may be considered. In addition to physical presence the courts have considered the place of the person's church and other organization membership, statements of residence given on income tax returns, deeds and other contracts, place of business or labor, In Re Toler's Estate, 325 S.W.2d 755 (1959); the payment of taxes, 28 C.J.S. Domicile § 18, p. 41; and, of course such residence addresses as have been given for various license purposes. Likewise in weighing these factors the courts have stated that the intent required to establish a residence cannot be for a mere special or temporary purpose. Trumbull v. Trumbull, 393 S.W.2d 82 (1965). None of these factors are conclusive and they cannot be weighed hypothetically as to their evidentiary value as the courts have not held any one factor determinative.

CONCLUSION

It is the opinion of this office that a student of eighteen years of age or over meeting the necessary constitutional and statutory requirements for voting may:

- 1) Retain his original residence and register and vote at such place.
- 2) Establish a residence in a different community and register and vote at such place if,
 - a) The student declares that he has abandoned his original residence and that he does not intend to return to such place; and,
 - b) He declares his intent to establish a residence in the community in which he resides for an indefinite period; and
 - c) Such declarations are consistent with facts which show that such voter has abandoned his original residence and intends to reside in such community.

Honorable Charles S. Broomfield

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

PAROLE:
NARCOTICS:
CRIMINAL LAW:
CRIMINAL PROCEDURE:
CONTROLLED SUBSTANCES:

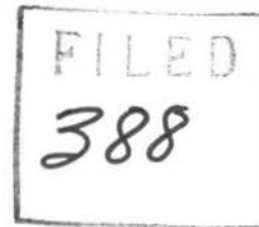
(1) The Board of Probation and Parole is compelled by Section 195.220 to continue supervision over a person paroled from the State Department of Corrections who was convicted of selling, giving, or

delivering a controlled substance for a period not less than the completion of the original sentence plus five years. (2) The Board of Probation and Parole is without authority pursuant to Section 195.220 to grant final release and issue a certificate of discharge pursuant to Section 549.275(2), RSMo 1969, to any person paroled from the Missouri Department of Corrections who was convicted of selling, giving, or delivering a controlled substance before a period of not less than the completion of that person's original sentence plus five years. (3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance, is not to be given credit for parole time as time toward service of his term of imprisonment pursuant to Section 549.275(1), RSMo 1969, and therefore, a person on parole from such a conviction must, on the revocation of the conditions of his parole, serve the remainder of the term set by the original sentence from which he was paroled.

OPINION NO. 388

November 8, 1971

Mr. Walter G. Sartorius, Chairman
Board of Probation and Parole
P. O. Box 267
Jefferson City, Missouri 65101



Dear Mr. Sartorius:

This is in reply to your request for an opinion of this office concerning the applicability of the recently enacted Section 195.220; said section reads:

"Notwithstanding Section 549.275, RSMo, if the board of probation and parole releases any person from a state penal institution who was convicted of selling, giving, or delivering a controlled substance as defined in this chapter, the period of parole shall be for not less than the completion of the original sentence plus five years. If, however, he is found to have violated the conditions of his parole, he shall be recommitted to confinement by the department of corrections for the remainder of the term set by the original sentence from which he was paroled."

Mr. Walter G. Sartorius

Concerning the foregoing statute, you ask three questions:

- (1) "Is the Board compelled to continue supervision for the plus 5 years mentioned in the Statute?"
- (2) "Have they [the board] lost their right to discharge people from parole supervision as set out in 549.275?"
- (3) "If they [the board] are compelled to keep an individual under supervision 5 years past his original sentence and the individual is revoked while he is serving this plus 5 years, how much time does he serve when he is returned to the Department of Corrections?"

Our research leads us to conclude that: (1) the Board of Probation and Parole is compelled by Section 195.220 to continue supervision over a person paroled from the State Department of Corrections who was convicted of selling, giving, or delivering a controlled substance for the five year period set out in that statute; (2) the Board of Probation and Parole is without authority pursuant to Section 195.220 to grant final release and issue a certificate of discharge pursuant to Section 549.275(2), RSMo 1969, to any person paroled from the Missouri Department of Corrections who was convicted of selling, giving, or delivering a controlled substance before a period of not less than the completion of that person's original sentence plus five years; (3) an individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance, is not to be given credit for parole time as time toward service of his term of imprisonment pursuant to Section 549.275(1), RSMo, and therefore, a person on parole from such a conviction must, on the revocation of the conditions of his parole, serve the remainder of the term set by the original sentence from which he was paroled.

Our conclusions are compelled in that Section 195.220, Senate Committee Substitute for House Committee Substitute for House Bill No. 69 of the 76th General Assembly, specifically sets out a period of parole which shall be for not less than the completion of the original sentence plus five years. Thus, if a person is convicted pursuant to Chapter 195 and committed to the Missouri Department of Corrections for a term of four years, and after two years is paroled by the Board of Probation and Parole the period of parole for such a person must be not less than two years, which would be his sentence in the Department of Corrections, plus five years.

Mr. Walter G. Sartorius

Thus, the mandatory period during which the Board of Probation and Parole supervises the individual committed to the Department of Corrections pursuant to Chapter 195 in our hypothetical would be a period of at least seven years. On revocation for violation of conditions of parole, the individual in our hypothetical must serve the remainder of the term, that of two years, set by the original sentence from which he was paroled.

In relation to Section 195.220 you express the following concern:

" . . . However, the real concern is once an individual has completed his original sentence what does he have to loose by absconding from supervision during the plus 5 because if he is revoked there is nothing left of his original sentence to serve in the Department of Corrections."

It should be noted, however, that the provisions providing that time spent on parole shall be credited and deemed service of the term of imprisonment of Section 549.275(1) and Section 549.265 (3), RSMo 1969, are statutory enactments, and do not derive from any right given by the Constitution of the State of Missouri. Ex parte Diehl (Spr.Ct.App. 1953) 255 S.W.2d 54. Thus, the legislature of the State of Missouri may abrogate this statutory right. Clearly, one does not have a constitutional right to a pardon or parole, State ex rel. Oliver v. Hunt (Mo. banc 1952) 247 S.W.2d 969, and the legislature is not constitutionally required to provide for parole. [For example, statutes failing to provide probation under certain federal narcotic laws have been held to be constitutional. See United States v. Del Toro (5th Cir. 1970) 426 F.2d 181; and United States v. Gudino (9th Cir. 1970) 432 F.2d 433.]

The question then is whether a person once given parole must, constitutionally, have applied toward the running of his sentence time spent on parole. This question must be answered negatively.

The rule generally applied is that a prisoner who is paroled may constitutionally be compelled to serve all of the time remaining on his sentence if he violates the conditions of his release. Zerbst v. Kidwell, 304 U.S. 359 (1928); Clark v. Blackwell (5th Cir. 1967) 374 F.2d 952; Van Horn v. Maguire (5th Cir. 1964) 328 F.2d 585; Johnson v. Wilkinson (5th Cir. 1960) 279 F.2d 683; and Clifton v. Beto (S.D. Texas 1968) 298 F.Supp. 1384; aff'd. 411 F.2d 1226. In the federal system statutes have been enacted which do not grant credit for time served on parole as time served on the sentence imposed where a parole or probation has been revoked. Title 18, Sections 4205 and 4207, U.S.C.A., state as follows:

Mr. Walter G. Sartorius

"A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the term he was sentenced to serve." (emphasis ours) Section 4205

"If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced." (emphasis ours) Section 4207

These sections have been upheld, and the failure to grant credit for time served on parole has been found to be constitutional. Howard v. United States (8th Cir. 1960) 274 F.2d 100, cert. denied 363 U.S. 832; Postelwait v. Willingham (10th Cir. 1966) 365 F.2d 759; Howerton v. Rivers (D.C. Cir. 1963) 326 F.2d 653. Thus, it is our conclusion that one released on parole has not had his constitutional rights violated by the failure to credit time served on parole as time toward his sentence.

For a similar decision in Missouri see Ex parte Mounce (Mo. banc 1925) 269 S.W. 385. In that case the court ruled, in construing Section 4158, Revised Statutes of Missouri 1919, that a statute may provide that a person's term of imprisonment is not reduced by the length of time that person is on judicial parole.

You have also questioned the effect of the provision in Section 195.220 which adds an additional five years to the period of parole. Obviously, a due process question arises as to the length of time a state may have under its jurisdiction a person placed on parole. That the five year period set out in Section 195.220 is constitutional, reference should be had by analogy to Section 549.071, RSMo 1969. That section deals with judicial probation and in pertinent part reads as follows:

" . . . In the case of a felony offense no probation under this chapter shall be granted for a term of less than one year, and no probation shall be granted for a term of longer than five years. . . ."

Mr. Walter G. Sartorius

[For a case discussing the distinction between probation and parole in Missouri see State v. Hicks (Mo. 1964) 376 S.W.2d 160.]

By this statute, the court is given the authority to commit a person to probation for a period not longer than five years, irrespective of the term of sentence. A similar statute, Title 18, Section 3651, U.S.C.A., has been interpreted to mean that a period of probation may exceed the maximum period of imprisonment to which a defendant might have been sentenced. Driver v. United States (4th Cir. 1956) 232 F.2d 418; Mitchem v. United States (6th Cir. 1951) 193 F.2d 55; Hollandsworth v. United States (4th Cir. 1929) 34 F.2d 423; and United States v. Sumpter (S.D. Texas 1968) 287 F.Supp. 608. Thus, we conclude that the extension by Section 195.220 of the period of parole for a length of time not less than the completion of the original sentence plus five years is constitutional and does not violate due process.

CONCLUSION

It is therefore the opinion of this office that:

(1) The Board of Probation and Parole is compelled by Section 195.220 to continue supervision over a person paroled from the State Department of Corrections who was convicted of selling, giving, or delivering a controlled substance for a period not less than the completion of the original sentence plus five years.

(2) The Board of Probation and Parole is without authority pursuant to Section 195.220 to grant final release and issue a certificate of discharge pursuant to Section 549.275(2), RSMo 1969, to any person paroled from the Missouri Department of Corrections who was convicted of selling, giving, or delivering a controlled substance before a period of not less than the completion of that person's original sentence plus five years.

(3) An individual under supervision of the Board of Probation and Parole who was sentenced to the State Department of Corrections for selling, giving, or delivering a controlled substance, is not to be given credit for parole time as time toward service of his term of imprisonment pursuant to Section 549.275(1), RSMo 1969, and therefore, a person on parole from such a conviction must, on the revocation of the conditions of his parole, serve the remainder of the term set by the original sentence from which he was paroled.

Mr. Walter G. Sartorius

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

August 16, 1971

OPINION LETTER NO. 389
Answer by letter-Wieler



Mr. Dexter D. Davis
Commissioner of Agriculture
Department of Agriculture
P. O. Box 630
Jefferson City, Missouri 65101

Dear Mr. Davis:

This is in response to your request for an opinion as to the authority of the Commissioner of Agriculture to register a brand consisting of arabic numerals only or arabic numerals in combination with letters or figures.

As you have stated in your request, House Bill No. 134, 76th General Assembly, has been signed by the Governor and will become law on September 28, 1971. This bill repealed Chapter 268, RSMo 1969, relating to marks and brands of animals and enacted in lieu thereof eighteen new sections dealing with the same subject. Under the new law, the Commissioner of Agriculture shall be responsible for registering brands in this state. Section 4 of this act provides that any person desiring to adopt a brand shall forward to the Commissioner proper brand application forms of the desired brand together with the proper fee and that such brand shall be filed and recorded by the Commissioner unless the brand is of record as that of some other person or conflicts with or closely resembles the brand of another person. The only other restriction contained in this act with respect to the composition of a registered brand is the requirement of Section 9 that no single letter or single figure be accepted as a registered brand.

The provisions of Section 7 do not restrict the Commissioner from registering brands containing arabic numerals. Section 7 provides that brands consisting of arabic numerals only may be used in conjunction with recorded brands for in-herd identification and as such shall not be recorded. The sole purpose of this provision

Mr. Dexter D. Davis

is to allow an individual to mark, for identification purposes, any animal within his herd by use of an arabic numeral in addition to his recorded brand without recording the same. See Section 8 which provides that any brand used for in-herd identification must be located at least ten inches apart from the recorded brand.

Therefore, it is our opinion that the Commissioner of Agriculture may accept and record any brand application consisting of more than one arabic numeral or a combination of arabic numerals and letters or figures as long as such brand does not conflict with or closely resemble the brand of another person.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PHYSICIANS:
STERILIZATION:

Missouri law does not prohibit the performance of voluntary contraceptive human sterilizations by licensed physicians.

OPINION NO. 393

August 19, 1971

Herbert R. Domke, M.D.
Acting Director
Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Dr. Domke:

This opinion is in response to your question in which you ask:

"May a licensed physician legally perform a voluntary, contraceptive human sterilization in this state?"

In this opinion we deal with the legality of voluntary non-therapeutic sterilization. We will not attempt to describe such procedures as they are commonly presently used in other states for "family planning." They are adequately described in legal publications such as the University of Pennsylvania Law Review, No. 113, p. 415 et seq., 1964-1965 and in lay publications such as Reader's Digest, January 1971, p. 53 and Reader's Digest, August 1971, p. 153.

Further, we are not here considering the legal aspects of castration but only note the obvious that there is a difference between castration and vasectomy: castration being physically more severe than the other. Davis v. Berry, 216 F. 413, 416 (D.C. Ia. 1914).

Nontherapeutic surgical sterilization means sterilization for the purpose of limiting the size of the person's family, as distinguished from sterilization for medical or health reasons. 35 A.L.R. 3d 1444 Anno.

At the outset we are confronted with the holding of this office, Opinion No. 62 dated October 3, 1946, to Herbert S. Miller, M.D. in which we held as follows:

". . . sterilization, by vasectomy or salpingectomy, or any other method, for eugenic, therapeutic [sic] or economic reasons is not authorized by the existing laws of this state;

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that this operation affects an inalienable right of the injured party, and that the rights of the public are invaded, and consent will not compensate, compromise or ratify such an operation so as to remove the criminal liability. A physician who performs such an operation, even with the consent of the patient may be criminally liable unless the operation is performed for therapeutic [sic] reasons necessary to preserve the life of the patient, or prevent serious impairment of health and for which there is no other adequate medical relief; and, of course, it follows that, if the operation by the physician was illegal, then it would also be illegal for the hospital to make its facilities available for the performance of such an illegal operation."

The above conclusion was primarily based upon an interpretation of what is now Section 559.200, RSMo 1969, which is Missouri's "mayhem" statute. That section states:

"Every person who shall, on purpose and of malice aforethought, cut or bite off the ear, or cut or disable the tongue, put out an eye, or slit, cut or bite-off the nose or lip, or shall cut off or disable any limb or member of any person, with intent to kill, maim or disfigure such person, shall be adjudged guilty of mayhem, and on conviction, be imprisoned in the penitentiary for a term not exceeding twenty-five years."

Missouri has never had and does not now have statutes either expressly prohibiting nontherapeutic surgical sterilization or allowing such operations.

The origin of the mayhem statute is said to be the "Coventry Act" enacted after an assault made upon Sir John Coventry in the street, ". . . and slitting his nose, by persons who lay in wait for him for that purpose, in revenge as was supposed for some obnoxious words uttered by him in parliament, . . ." Section 559.200, V.A.M.S. Anno., p. 545. And, it has been further noted that at common law the crime of mayhem consisted of the unjustified infliction of an injury which rendered the victim less able to fight for the king, to defend himself, or to earn his own living. ⁴ Blackstone, Commentaries, 205-206 (7th Oxford Ed. 1775). However, in this respect it has also been stated that since neither vasectomy nor salpingectomy have any effect upon the physical capacity of the patient

Herbert R. Domke, M.D.

beyond the inability to procreate, they would not constitute mayhem at common law. 113 Univ. of Pa. L. Rev., p. 428. While the Missouri statute with respect to mayhem does not require a "lying in wait" and must be considered on its own, nevertheless, it would appear to be unreasonable to judge the criminal aspects of the mayhem statute in the premises and in light of the strict construction given to criminal statutes without regard to the historical purposes of the prohibition and the evolution of the legislation.

In our previous opinion we reached the conclusion that consent to a sterilization operation did not prevent the operation from being an unlawful act. Such a conclusion, however, appears to be an improper assessment of the consequences of consent in such a situation. While consent is not considered a defense in cases such as incest, seduction, adultery, or the maiming of another so as to render him unfit for service, Section 182, Wharton's Criminal Law, Volume 1, 12th Edition, nevertheless, it strains reason to disregard the element of consent and to inject the element of malice aforethought into an area such as this which involves consensual surgical procedures which have a valid and perhaps even a constitutionally protected purpose completely unrelated to the protection of the public.

In this respect we noted, in our previous opinion, from Wharton's Criminal Law, Volume 1, 12th Edition, Section 181 that:

"In those classes of crimes and offenses in which the injury is purely personal to the party, and affects his alienable rights only, the injury may be compensated and compromised and the act ratified, thus eliminating the criminal element and relieving the offender from liability to criminal prosecution; but it is otherwise in those classes of cases in which the inalienable rights of the injured party are affected, or the rights of the public are invaded."

While we have no Missouri cases dealing with this subject, we note that the question was thoroughly reviewed in Jessin v. County of Shasta, 274 Cal.App.2d 737, 79 Cal.Rptr. 359 (1969) by the Court of Appeal, Third District of California.

In considering the legality of a voluntary nontherapeutic surgical sterilization in the State of California, the court rejected an opinion by the Attorney General of that state which advanced the view that consensual vasectomies are illegal since they counter against a public policy of a high birth rate and suggested that such vasectomies constitute mayhem. The court stated that:

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" . . . This latter suggestion is unacceptable for, as the trial court pointed out, a voluntary vasectomy is in no way done 'maliciously.' . . ."

This California Court of Appeal also recognized the holdings of Custodio v. Bauer, 251 Cal.App.2d 303, 59 Cal.Rptr. 463 (1967), Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), and Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957) and noted that a sterilization operation for the purpose of family limitation motivated solely by personal or social-economic considerations is not contrary to public policy. The court stated that it is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion that a court may constitute itself the voice of the community in declaring such policy.

Therefore, while we do not purport to consider the varied aspects of civil legal liability with respect to such surgical procedures which are dealt with elsewhere, 113 Univ. of Pa. L. Rev., p. 415 et seq.; 27 A.L.R.3d 906. 22 A.L.R.3d 1441; 93 A.L.R. 573, it is our view that the reasoning of the Court of Appeal of California in Jessin v. County of Shasta is applicable to the laws of this state.

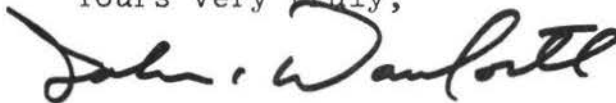
Opinion No. 62 dated October 3, 1946, to Herbert S. Miller is hereby withdrawn.

CONCLUSION

It is, therefore, the opinion of this office that Missouri law does not prohibit the performance of voluntary contraceptive human sterilizations by licensed physicians.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

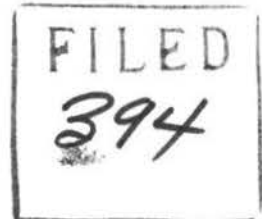
BANKS:

By virtue of Senate Bill No. 146 of the 76th General Assembly, effective September 28, 1971, a bank in an unincorporated community is not prohibited by law from having a drive-in or walk-up facility in that community when such a facility is within four thousand yards of the bank's main banking house even though in measuring that distance the line of measurement crosses through an incorporated city, town or village.

OPINION NO. 394

August 19, 1971

Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
Room 1201, 12th Floor
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to your request for an opinion concerning measurement of the distance between a main banking house and a drive-in or walk-up facility which a bank proposes to establish.

Your request points out that there is a bank in an unincorporated community which desires to establish a drive-in or walk-up facility less than four thousand yards (the maximum distance permitted under Senate Bill No. 146, 76th General Assembly, effective September 28, 1971) from its main banking house, the facility to be in the unincorporated community; but in measuring the distance between the main banking house and the facility, in order to stay within four thousand yards, it is necessary to measure the distance along a line that begins with the main banking house in the unincorporated community and continues into an incorporated city and then out of the incorporated city into the unincorporated community where the proposed facility is intended to be located.

Senate Bill No. 146 of the 76th General Assembly which repeals Section 362.107, RSMo 1969, and enacts in lieu one new section relating to the same subject. The provisions of such bill become effective September 28, 1971. The provisions of such bill relevant to this inquiry are as follows:

"362.107. 1. Any other law of this state to the contrary notwithstanding, every bank and every trust company organized under the laws of this state which has the corporate power

Mr. H. Duane Pemberton

to receive deposits may, upon compliance with this section, maintain and operate separate and apart from its banking house one facility for drive-in or walk-up service, where only checks may be paid, deposits received, deposits withdrawn, change made, exchange made, bank money orders issued and loan payments received.

"2. No such bank or trust company may maintain or operate:

* * *

"(2) Such a facility located more than four thousand yards from the main banking house; or

"(3) Such a facility outside the limits of the city, town or village or unincorporated community in which its banking house is located; . . ."

Based on the portions of such bill quoted above, it is apparent that the General Assembly requires that a drive-in or walk-up facility be not more than four thousand yards from the main banking house and in those situations where the main banking house is in an unincorporated community the drive-in or walk-up facility be located in that unincorporated community. However, in measuring the distance between the main banking house and the drive-in or walk-up facility, we do not read the statute to prohibit measuring along a line which goes through a portion of an incorporated city so long as the main banking house and the drive-in or walk-up facility are both in the same unincorporated community. Such a conclusion is based on the fact that paragraph 2 of section 2 of Section 362.107 sets a distance limitation for the drive-in or walk-up facility without making mention of where, within such distance, such a facility may be located (cf. Paragraph 4 of Section 2 limiting the distance such a facility may be located with respect to an existing bank). Paragraph 3 of section 2 requires that the drive-in or walk-up facility be in the same city, town, village or unincorporated community as is the main banking house, but that paragraph sets no limitation as to the distance between the main banking house and the drive-in or walk-up facility. It would violate the definite language of each of those paragraphs to read them in such a fashion as to hold that the legislature has prohibited a drive-in or walk-up facility when, in measuring the distance between the facility and the main banking house, the line of measurement goes through a city, town or village.

Mr. H. Duane Pemberton

It should be noted that in answering this opinion request we limit ourselves strictly to the specific question asked and do not consider whether the bank is otherwise entitled to establish a drive-in or walk-up facility.

CONCLUSION

It is the opinion of this office that by virtue of Senate Bill No. 146 of the 76th General Assembly, effective September 28, 1971, a bank in an unincorporated community is not prohibited by law from having a drive-in or walk-up facility in that community when such a facility is within four thousand yards of the bank's main banking house even though in measuring that distance the line of measurement crosses through an incorporated city, town or village.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

COUNTIES:
TAXATION:
TAX ANTICIPATION NOTES:

1. Tax anticipation notes may be issued by a fourth class county equal to but not to exceed ninety percent of the anticipated income

and revenue of the county, and the indebtedness created and warrants issued are valid even though all of the anticipated revenue is not collected, and such indebtedness may be paid from surplus revenues received in subsequent years. 2. Taxes for county purposes in a fourth class county may be increased in excess of fifty cents on the one hundred dollars valuation by a two-thirds vote of the electors for a period not to exceed four years. 3. Any county may become indebted in an amount exceeding the annual income and revenue by a two-thirds vote of the electorate not to exceed ten percent of the value of taxable tangible property and issue bonds payable within twenty years.

OPINION NO. 395

September 30, 1971

Honorable Henry S. Clapper
Prosecuting Attorney
Lawrence County Courthouse
Mt. Vernon, Missouri



Dear Mr. Clapper:

This is in response to your request for an opinion from this office as follows:

"To what source may a county court look for revenue to complete a fiscal year once the 90 percent limit of tax anticipation notes has been reached, said limits stated in Section 50.090. Is this method of borrowing against anticipated revenue, the only source of income open to the county to pay current expenses?"

Lawrence County is a fourth class county.

In order to answer your question it is necessary that we consider provisions of the Constitution and statutes of this state governing county finance.

Article VI, Section 26(a), Constitution of Missouri, 1945, provides:

"No county, city, incorporated town or village, school district or other political corporation

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or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

Under this constitutional provision, counties are prohibited from becoming indebted in any amount exceeding in any year the income and revenue provided for such year plus any unencumbered balance in the preceding year except as otherwise provided in this Constitution.

Additional indebtedness is otherwise provided for in the Constitution under Article VI, Section 26(b) which provides:

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

Article VI, Section 26(c) of the Constitution provides:

"Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur and additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)."

Article VI, Section 26(f) provides that before any indebtedness is incurred an annual tax shall be provided to pay the principal and interest and retire the same within twenty years.

The above constitutional provisions were a part of the Constitution of 1875 in substantially the same form.

Under the above constitutional provisions, the only method in which a county may become indebted in excess of the income and revenue provided for such year is by a vote of two-thirds of the qualified electors voting thereon.

Honorable Henry S. Clapper

The first question concerns the authority of the county to become indebted during the year in advance of the tax collections. One method provided by statute for a county to obtain money in advance of tax collections during the year to meet current expenses is by the sale of tax anticipation notes. Sections 50.070, 50.080, 50.090, 50.100, 50.110, 50.120 and 50.140, RSMo 1969, provide the method by which class one, three and four counties may issue tax anticipation notes not to exceed ninety percent of the total anticipated revenue in the county for the year in which they are issued. Proceeds from the sale of these notes is required to be deposited in the county treasury and used solely for the payment of county warrants of the county issued for payment of the expenses and obligations of the county for the fiscal year in which said notes are issued. They are to be paid from the taxes and other revenues of the county as collected and received during that year. The amount of anticipated revenue is to be determined as provided in Section 50.110, RSMo 1969.

Of course, this money has to be withdrawn from the county treasury by warrants in the same manner as other county funds including the remaining ten percent of the anticipated revenue not pledged by the tax anticipation notes.

Section 50.180, RSMo 1969, provides that when a county court shall ascertain any sum of money is due from the county it shall order the county clerk to issue a warrant payable to the person entitled to the same specifying on what account the debt was incurred.

Section 50.210, RSMo 1969, provides that the county treasurer shall not pay any warrant unless there is money in the treasury for that purpose, and if there be no money in the treasury for such purpose, the treasurer shall so certify on the back of the warrant and the date.

Section 50.220, RSMo 1969, provides as follows:

"He [county treasurer] shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer, stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment; provided, however, that no warrant issued on account of any debt incurred by any

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county, other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated."

Under the above provision warrants issued for the ordinary and usual expenses of the county and all expenses necessary to maintain the county organization shall take priority in payment. Our courts have held that a county may become indebted and issue warrants therefor in an amount equal to but not to exceed the total amount of income and revenue provided for during that fiscal year.

In the case of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S.W. 318 (banc 1920), the Clark County Court issued warrants which were not paid when due and the holders thereof sued and obtained judgment against Clark County. At a special election the voters approved a bond issue the proceeds thereof to be used to satisfy the judgment rendered against the county. In discussing the validity of the warrants and the bond issue, the court stated at 208 l.c. 696:

"I. It is suggested that the warrants which furnished the basis of the judgment mentioned were the accumulations of years. Also that many other counties are situated just as is Clark County. We need not blind our eyes to facts which everybody knows. The counties of the State, in anticipation of their yearly revenue, issue warrants against such revenue. The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year. By valid contracts we mean contracts within the anticipated revenue of the year. Thus in Trask v. Livingston County, 210 Mo. l.c. 594, it is said:

"It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt

Honorable Henry S. Clapper

is contracted or created, and prohibits the anticipation of the revenues of any future year.'

"So also in State ex rel. v. Johnson, 162 Mo. 1.c. 629, it is said:

"'It was ruled in Book v. Earl, 87 Mo. 246, that "the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year." But it was at the same time said: "Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

"'It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in subsequent years. [Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. 1.c. 39; State ex rel. v. Payne, 151 Mo. 1.c. 673;

Honorable Henry S. Clapper

Railroad Co. v. Thornton, 152 Mo. 570; State ex rel. v. Allison, 155 Mo. l.c. 344; and on this point, Reynolds v. Norman, 114 Mo. 509.]'

"By failure to collect taxes, and other reasons, there are many valid outstanding county warrants in the several counties of the State--nearly \$2,000,000 dollars according to reports. By valid outstanding warrants, we mean warrants issued for the current expenses of the year, and warrants which, when issued, were within the anticipated revenue of the year. By the issuance of the bonds involved here, Clark County is seeking to discharge judgments upon warrants of this character. This we say because the validity of the warrants is vouched for by court judgments. If Clark County is successful, the other counties, to use a homely expression, 'will follow suit.'

"As said in State ex rel. v. Johnson, supra, warrants of this character are not invalid because the revenue for the year (as collected) does not meet them, for they may be paid out of the surplus revenues of future years. Of course, there could be no surplus until all debts of the current year have been provided for or met. Up to this time we have not gone further in the protection of such warrants, so that we have a new idea suggested by the instant case. Such indebtedness should be paid, if any legal and constitutional method can be devised. The question is, has Clark County devised such a method?

"II. In the very lucid brief of the Attorney-General for respondent it is said:

"'The only manner by which an indebtedness in excess of the income and revenue for any year may be lawfully created is with the assent of two-thirds of the qualified voters voting at an election held for that purpose, as provided by Section 12 of Article X of the Constitution.'

"This is a true statement of the situation, if you read into it what kind of indebtedness,

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as this court has repeatedly said, and we have outlined in the previous paragraph. That is to say, an indebtedness contracted in excess of the anticipated revenue is invalid, but an indebtedness contracted within the anticipated year's revenue is valid, although all of the anticipated revenue may not be collected. It is the revenue which is provided for and should come into the county treasury during the year, that fixes the status (as to validity or invalidity) of the indebtedness contracted during the year, rather than the revenue actually collected and paid out on warrant. We should probably use the term 'income and revenue' as distinguished counsel have used, because the receipts of a county may come from several different sources." (Emphasis supplied)

The "new method" to which the court referred was the issuance of bonds for which there was no statutory authority at that time but which is now provided by statute.

Under this decision an indebtedness contracted by the county in excess of anticipated revenue is invalid, but an indebtedness contracted within the anticipated year's revenue is valid although all of the anticipated revenue may not be collected and warrants issued in payment of such indebtedness are valid warrants and may be paid out of surplus revenues in subsequent years if such is available.

So far we have been discussing the methods available to the county in obtaining funds for current use in advance of the tax collections for the year by issuing tax anticipation notes or by issuing county warrants during the year in excess of the funds available when the warrants are issued.

A fourth class county may by a vote of the people increase its tax rate and thus obtain more revenue for county purposes.

The annual tax for county purposes is provided in Section 137.065, RSMo 1969, which provides in part as follows:

"1. For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified: In counties having three hundred million dollars or more assessed

Honorable Henry S. Clapper

valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents; provided, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor."

This statute is derived from the provisions of Article X, Section 11(b) and 11(c) of the Constitution.

Under the above statute the annual tax rate for county purposes may be increased in excess of the fifty cent levy for a period not to exceed four years by two-thirds vote of the people. This does not authorize a county to become indebted in excess of the anticipated revenue for the calendar year but merely authorizes the county to increase the annual tax to obtain more revenue for county purposes for the calendar year. There is no limit to the rate of tax that may be voted under this provision.

Statutory authority for the county to become indebted and issue bonds in excess of the income and revenue provided for a calendar year is found in Chapter 108, RSMo. Section 108.010, RSMo 1969, provides as follows:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Section 108.020, RSMo 1969, provides as follows:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur as indebtedness for county purposes in addition to that authorized in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."

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Section 108.130, RSMo 1969, provides as follows:

"The several counties and municipalities of this state are hereby authorized to fund any judgment indebtedness of such county or municipality and to issue bonds therefor as provided by the general law governing the issuance of bonds by counties and municipalities respectively. The issuance of such funding bonds under this section shall be deemed and held by all courts in this state, to all intents and purposes, the incurring of a new indebtedness; and thereafter no question shall ever be raised in any court as to the validity of such indebtedness, except questions of constitutional limitation of indebtedness. Such funding bonds shall not be exchanged or delivered in payment of such judgment indebtedness nor any part thereof. The provisions of this section shall not be deemed to be repugnant to nor inconsistent with section 108.140; but the power and authority hereby conferred shall be deemed to be cumulative thereof."

Under the above statutory provisions fourth class counties may become indebted in an amount exceeding in any year the income and revenue provided for such year, but not to exceed ten percent of the value of the taxable tangible property, by a two-thirds vote of the electors and by levying a tax sufficient to pay the principal and interest of the bonds when due not to exceed twenty years. This is the only method available for a county to obtain money in excess of the annual county revenue for county expenses.

CONCLUSION

It is the opinion of this office that:

1. Tax anticipation notes may be issued by a fourth class county equal to but not to exceed ninety percent of the anticipated income and revenue of the county, and the indebtedness created and warrants issued are valid even though all of the anticipated revenue is not collected, and such indebtedness may be paid from surplus revenues received in subsequent years.

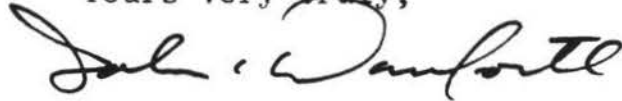
2. Taxes for county purposes in a fourth class county may be increased in excess of fifty cents on the one hundred dollars valuation by a two-thirds vote of the electors for a period not to exceed four years.

Honorable Henry S. Clapper

3. Any county may become indebted in an amount exceeding the annual income and revenue by a two-thirds vote of the electorate not to exceed ten percent of the value of taxable tangible property and issue bonds payable within twenty years.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

August 23, 1971

OPINION LETTER NO. 396
Answer by Letter - Klaffenbach

Mr. Robert E. Myers
State Land Surveyor
Missouri State Land Survey
Authority
P. O. Box 1158
Rolla, Missouri 65401



Dear Mr. Myers:

This letter is in answer to your opinion request in which you ask whether the State Land Survey Authority, Section 60.500, RSMo 1969, et seq., is the "duly authorized state agency" under Section 60.460, RSMo 1969, having authority to modify the one-half mile limitation provision with respect to the coordinate system. Section 60.460 provides:

"No coordinates based on the Missouri coordinate system, purporting to define the position of a point on a land boundary, shall be presented to be recorded in any public land records or deed records unless the point is within one-half mile of a triangulation or traverse station established in conformity with the standards prescribed in section 60.450; provided, that the one-half mile limitation may be modified by a duly authorized state agency to meet local conditions."

We find no express provision authorizing the State Land Survey Authority or any other agency to modify the one-half mile limitation and although this is possibly an unintentional omission on the part of the legislature we are of the view that we cannot supply the deficiency by implication from the powers given the State Land Survey Authority under Section 60.510, RSMo 1969.

Mr. Robert E. Myers

That is, Section 60.460 requires that the agency be "duly authorized" and it is our view in this context that this means expressly authorized by the state legislature.

It is therefore our view that the State Land Survey Authority has no power to modify the one-half mile limitation found in Section 60.460, RSMo 1969.

Very truly yours,

JOHN C. DANFORTH
Attorney General

MAGISTRATES:
PROBATE JUDGES:
COMPENSATION:

The effective date of the 1970 decennial census with respect to the determination of magistrate judges and probate judges salaries is July 1, 1971. The effective date for the determination of maximum allowance for probate and magistrate clerks, deputy clerks and employees is July 1, 1971.

OPINION NO. 397

October 13, 1971

Mr. John C. Vaughn
Comptroller & Budget Director
Post Office Box 809
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This opinion is in response to your question in which you ask:

"Upon what date does the 1970 decennial census become effective in regard to the salaries of Magistrate Judges, Probate Judges and Ex Officio Magistrates and their clerks."

As you are aware, the Supreme Court of Missouri, en Banc, on June 14, 1971, handed down its decision in State ex rel. Stark v. Jeter, 467 S.W.2d 882, relative to this subject.

That case was a mandamus proceeding by a probate judge-ex officio magistrate to command the county court judges to cause county warrants to be issued for his compensation as a probate judge. In that case the probate judge-ex officio magistrate was elected to begin his term of office as of January 1, 1971 in a county having a population of more than 30,000 inhabitants but not more than 65,000 inhabitants under the 1970 decennial census. Relator claimed that in addition to the compensation provided for magistrates under Section 482.150, subsection 1(6), RSMo 1969, he was entitled to the salary, to be paid by the county, for probate judges under Section 481.200, subsection 1(3), RSMo 1969.

In denying the writ the court considered the provisions of subsection 1 of Section 1.100, RSMo 1969, which state:

Mr. John C. Vaughn

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961."

The court held at l.c. 883 with respect to the above provisions that:

"This Court has held that probate judges are not 'county officers.' State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S.W. 783; State ex rel. St. Louis County v. Kirkpatrick, Mo.Sup., 426 S.W.2d 72. This case, of course, involves a probate judge. Therefore, those portions of V.A.M.S. §1.100 which purport to affect 'the salary of any county officer' have no application to this case. This means that the statutory reference to January 1, 1971 is of no significance in this case. The statutory references to July 1, 1971, are of much significance."

The court concluded that as of January 1, 1971, relator became the judge of the probate court and also judge of the magistrate court but that on July 1, 1971 he would no longer be judge of the magistrate court. Therefore relator was entitled to compensation for his services rendered as probate judge and magistrate judge for the period January 1, 1971 through June 30, 1971 under the provisions of Section 482.150, subsection 1(4) at the rate of \$12,400.00 per annum and was entitled to compensation for services rendered as probate

Mr. John C. Vaughn

judge on July 1, 1971 and thereafter at the annual salary of \$13,000.00 payable by the county under subsection 1(3) of Section 481.200. The holding of the court appears to indicate by reference to Section 483.475, RSMo 1969, that probate clerks and assistants of the probate judge who took office January 1, 1971, would, on and after July 1, 1971, be subject to the compensation provisions of Section 483.475. The court also held that the person appointed magistrate on July 1 and thereafter would be entitled to an annual salary of \$11,800.00 under Section 482.150, subsection 1(6).

Therefore with respect to the effective date of the decennial census as it pertains to salaries of probate judges the court clearly held that the significant date is July 1, 1971.

With respect to the effective date in regard to the salaries of magistrate judges we believe that the opinion of the court is applicable to magistrate as well as probate judges and that magistrate judges are not "county officers" within the meaning of the provisions of Section 1.100, and therefore, the significant date with respect to such magistrates is July 1, 1971. State ex rel. St. Louis County v. Kirkpatrick, 426 S.W.2d 72 (Mo. 1968).

In regard to your question concerning clerks of the magistrate and probate courts, magistrate clerks come within the provisions of Section 483.490, RSMo 1969. When the judge of the probate court is also the judge of magistrate court he may designate one or more of his clerks, deputy clerks or employees to serve in the probate court. Section 483.490, subsection 2. The magistrate clerks salaries are paid by the state (except for clerks of additional magistrates created by order of the circuit court under Section 482.010, RSMo 1969) within the limits of Section 483.490. As we noted above, probate clerks in counties of more than 30,000 inhabitants are appointed by the probate judge and paid by the counties within the limits of Section 483.475.

It is our view that clerks, deputy clerks and other employees of the probate and magistrate courts are not "county officers" within the meaning of Section 1.100, (see State ex rel. Webb v. Pigg, 249 S.W.2d 435 (Mo. 1952)) and that Sections 483.475 and 483.490 do not ascertain the particular salary of such clerks, deputy clerks or other employees but merely prescribe the total amounts allowable for the payment of all such persons salaries. Thus we conclude that July 1, 1971 is the significant date with respect to the maximum amounts allowable for the payment of magistrate and probate clerks, deputy clerks and other employees.

We note that Section 1.100, RSMo 1969 was repealed by House Bill No. 154 of the 76th General Assembly, approved June 8, 1971, which is in full force and effect by reason of an emergency clause upon its

Mr. John C. Vaughn

passage and approval. While it is difficult to view the bill as an emergency act in this context we will not attempt to pass upon the validity of the emergency clause. However, we set out below the pertinent portion of the bill for your information:

"1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961.

"2. Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed. Once a city not located in a county has come under the operation of such a law a subsequent loss of population shall not remove the city from the operation of that law. No person whose compensation is set by a statutory formula, which is based in part on a population factor, shall have his compensation reduced due solely to an increase in the population factor."
(Emphasis added)

We have considered the possible application of the above underscored provision with respect to clerks of the magistrate court.

Mr. John C. Vaughn

Section 483.485 provides that the various magistrates fix the compensation of clerks, deputy clerks and employees within the amounts fixed in Section 483.490. As the salaries of the magistrate court personnel are set within the statutory limits by the magistrates, it is our view that such compensation is not set by a statutory formula within the meaning of the amendment to Section 1.100 prohibiting a reduction in compensation solely due to an increase in the population factor.

What we have said with respect to the effective date for the payment of magistrate judges and probate judges salaries also applies of course to a probate judge-ex officio magistrate since as we have indicated under Section 482.150 and in accordance with State ex rel. Stark v. Jeter, the probate judge-ex officio magistrate (in counties of 30,000 inhabitants or less) receives a salary provided for the magistrate in such a county which includes his compensation as probate judge of the county.

In your correspondence you have also referred to our Opinion No. 80 to Mr. Schwada, dated January 26, 1961, in which we held that the effective date of the 1960 census with respect to magistrates salaries was January 1, 1961. In our view that conclusion conflicts with the holding of the Supreme Court in State ex rel. Stark v. Jeter and with this opinion, and therefore, such opinion is withdrawn.

We reaffirm our holding in Opinion No. 196, dated March 23, 1971, to the Honorable Vic Downing (copy enclosed) that a decrease in population of a county to under 30,000 inhabitants does not cause a vacancy in the offices of probate or magistrate judges and that the incumbent probate judge becomes ex officio magistrate on July 1, 1971. Under such a circumstance however, such a probate judge as of July 1, 1971, receives compensation paid by the state as provided under the schedule for the salaries of magistrates, Section 482.150. The magistrate is likewise compensated according to the classification applicable to his county as of July 1, 1971. While it is unlikely that such a change would result in any reduction in salary to either the magistrate judge or the probate judge-ex officio magistrate, we note that the pertinent provision of amended Section 1.100 prohibits only a reduction in such compensation due solely to an increase in the population factor. In circumstances where the county population decreases such a prohibition would not apply.

We also note with respect to the ascertainment of officers salaries based on population figures that Section 24 of Article V of the Missouri Constitution which prohibits a decrease in a judges salary during his term of office does not prevent a decrease during such judges term because of a change in population where the statutory classification existed prior to the beginning of such term.

Mr. John C. Vaughn

State ex rel. Moss v. Hamilton, 260 S.W. 466 (Mo. 1924); State ex rel. Harvey v. Linville, 300 S.W. 1066 (Mo. 1927).

CONCLUSION

It is the opinion of this office that the effective date of the 1970 decennial census with respect to the determination of magistrate judges and probate judges salaries is July 1, 1971.

The effective date for the determination of maximum allowance for probate and magistrate clerks, deputy clerks and employees is July 1, 1971.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

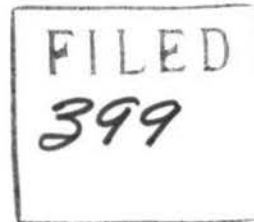
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 196
3-23-71, Downing

August 18, 1971

OPINION LETTER NO. 399
Answer by Letter - Burns

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in answer to your letter of recent date in which you inquire whether the ballot form prescribed by Section 111.361 or Section 125.050, RSMo 1969, shall be followed when proposed constitutional amendments are submitted to the voters for approval or rejection. You specifically ask whether there shall appear beside or below the official ballot title of each proposed constitutional amendment the words "YES" and "NO" with boxes following such words, or the words "For" and "Against" with boxes to the left of such words.

Section 111.361, RSMo 1969, provides as follows:

"When the secretary of state has certified to each county clerk or board of election commissioners a proposition or question to be submitted to a vote of the people, ballots shall be prepared and distributed on which the proposition or question shall be printed, and beside or immediately below the proposition or question shall be printed a 'YES' and a 'NO' followed by a square whose sides shall be not less than one-fourth inch in length. Beneath the entire question and the 'YES' and 'NO' and their respective boxes, there shall be printed instructions as follows: 'If you are in favor of this proposition (or question), place an X in the box opposite "YES". If you are opposed to this proposition (or question), place an X in the box opposite "NO".'

Honorable James C. Kirkpatrick

The secretary of state shall specify the exact wording of the instructions in his certification of the proposition or question, and all ballots which are used at the election shall be printed only in accordance with this section."

Section 125.050, RSMo 1969, provides in part as follows:

"The vote on a proposition to call a constitutional convention or on the adoption of a new constitution, or on any proposed constitutional amendment, shall be taken by ballot. . . . If but one constitutional amendment has been proposed by the general assembly or by the initiative, each official constitutional ballot shall have printed thereon the words 'Constitutional Amendment No. 1' followed by the official ballot title as provided for in this chapter, and to the left of the official ballot title, the words 'For' and 'Against' one above the other. But if more than one constitutional amendment has been so proposed, then each ballot shall have printed thereon the words 'Constitutional Amendment No. 1', and so on, setting out the official ballot title of each proposed amendment thereunder and to the left of the official ballot title the words 'For' and 'Against' one above the other, designating in numerical order each proposed constitutional amendment as arranged by the secretary of state. The official ballot title shall be printed with the number of the proposed constitutional amendment on the official ballot and the words 'For' and 'Against' in bold blackfaced type in capital letters not less than eight point in size nor more than ten point in size. At the left of the word 'For' and the word 'Against' shall be placed a small square, not less than one-fourth of an inch in length. . . . To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against'. . . ."

It can be seen that under provisions of Section 111.361, the ballot is to contain at the side or immediately below the proposition or question certified to each county clerk or board of

Honorable James C. Kirkpatrick

election commissioners by the Secretary of State the words "YES" and "NO" and that such words each shall be followed by a square in which an X mark can be made.

Section 125.050, provides that when a constitutional amendment or constitutional amendments are to be submitted by a ballot the ballot is to contain titles for the various constitutional amendments submitted and that to the left of such ballot titles shall appear the words "For" and "Against" and that at the left of the word "For" and at the left of the word "Against" there shall be placed a square box in which a mark can be made so that the electorate can vote to adopt or reject such constitutional amendments.

The question to be decided is which statute shall be followed when constitutional amendments are submitted for approval or rejection by the voters; that is whether the words "YES" and "NO" or "For" and "Against" are to appear on the ballot so that the voters may vote to approve or reject such constitutional amendments.

We believe that the rule to be applied here is that found in the case of *State ex rel. v. Carolene Products Co.*, 144 S.W.2d 153, decided by the Supreme Court of Missouri, in Banc. In that case the Court quoted with approval from the case of *State ex rel. v. Fulks*, 247 S.W. 129. The Court said at l.c. 156:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' . . ."

It is our view that while the provisions of Sections 111.361 and 125.050, are to be read together and harmonized if possible, to the extent of any repugnancy between them, Section 125.050, insofar as constitutional amendments are concerned is a special statute which deals with such subject in a minute and definite way and prevails over any contrary provisions in Section 111.361.

Honorable James C. Kirkpatrick

In our view Section 125.050 controls insofar as constitutional amendments are concerned and therefore the constitutional ballot containing the proposed constitutional amendments should have to the left of the official ballot title for each proposed constitutional amendment the words "For" and "Against" in bold blackfaced type in capital letters not less than eight point or more than ten point in size.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 7, 1971

OPINION LETTER NO. 400
Answer by letter-Jones

Mr. Edwin M. Bode
Executive Secretary
Missouri State Employees'
Retirement System
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bode:

This letter is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"Advice is requested in regard to a member who has ceased to be an employee of the State of Missouri sometime prior to his Normal Retirement Date. We are referring to a member at least sixty years of age who has accumulated fifteen or more years of creditable service or who has served six or more years as a member of the General Assembly, and in either case, has not been refunded his accumulated contributions to the Fund.

"Our Question Is:

1. Are those employees who are no longer employees of the State as referred to above, eligible to make the election for survivorship benefits under Section 104.395, RSMo 1969?"

In connection with the above, Section 104.395, RSMo 1969, reads as follows:

"In lieu of the normal annuity otherwise payable to him under section 104.390, a member

Mr. Edwin M. Bode

whose age at retirement is sixty years or more may elect in his application for retirement to receive the actuarial equivalent of his normal annuity in reduced monthly payments for life during retirement with the provision that upon his death the reduced normal annuity shall be continued throughout the life of and paid to his spouse. The election may be made only in the application for retirement and such application must be filed prior to the date on which the retirement of the member is to be effective; provided that if either the member or the spouse nominated to receive the survivorship payments dies before the effective date of retirement, the election shall not be effective; except that if the member dies after attaining age sixty and before retirement his spouse, if named as his beneficiary, may elect to receive either the reduced survivorship benefits under this section calculated as if the member had retired as of the date of his death or a payment of his accumulated contributions."

The assumption is made that the opinion request refers to an individual who is not presently employed by the state; and who does not reenter state employment in the future.

In Opinion Letter No. 22, Bode, 4-26-71 (copy enclosed), it was held that the amount of retirement benefits due a member of the retirement system who had ceased to be an employee of the state sometime prior to his normal retirement date, but was at least sixty years of age and had accumulated fifteen or more years of creditable service or served six or more years as a member of the General Assembly, and had not been refunded his accumulated contributions to the fund, were determined under the law in effect at the time the member ceased to be an employee of the state. The reasoning of the opinion was in accordance with the decision in State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (Mo. banc 1962). In this case, it was held by the Supreme Court of Missouri sitting en banc, that a 1961 amendment to a 1957 statute permitting payment of increased benefits to retired members (emphasis ours) of the Missouri State Employees' Retirement System would take a portion of the fund existing when the amendment was passed to pay the increase and would impair a contract with active members in violation of Section 13, Article I of the Missouri Constitution.

It is submitted that the factual situation as presented is distinguishable from the Breshears case. It is to be noted that Section 104.395, RSMo, provides that a member may elect in his application for retirement to receive the "actuarial equivalent" of

Mr. Edwin M. Bode

his normal annuity. In this regard, the term "actuarial equivalent" is defined in subsection 2 of Section 104.010, RSMo 1969, as follows:

"'Actuarial equivalent', a benefit which, when computed upon the basis of actuarial tables and interest, is equal in value to a certain amount or other benefit;"

In addition, the following comment is made by the actuarial consultant to the Missouri State Employees' Retirement System in a letter to this office on November 16, 1971:

"The amount of benefit paid to a member retiring under the normal form of annuity, that is, the benefit payable to him during his lifetime with the minimum return of his accumulated contributions at retirement, is determined by his service and his average compensation. This benefit in the amount of X dollars a month has a value. When a retiring member elects the survivor option, the monthly benefit is reduced by the application of a factor which is based on the member's age and sex, and the age of the spouse. The resulting amount of monthly benefit payable to the member during his lifetime with the same amount continued to the surviving spouse during her lifetime has the same value, at retirement, as the amount paid to the member under the normal form.

"The factor which is applied has been calculated by us to reflect the actuarial tables and interest assumption approved by the Board."

As the result of the above, it is our view that under Section 104.395, RSMo, whether an individual retires at five-sixths of one percent or one percent, the individual will only receive the actuarial equivalent of his normal annuity which has previously been calculated by the actuary if he elects the option, and that the rights of present members would not be infringed. It is, therefore, our opinion that those employees who are no longer employees of the state, as referred to above, are eligible to make the election for survivor's benefits under Section 104.395, RSMo.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure Op. No. 22
4-26-71, Bode

August 27, 1971

OPINION LETTER NO. 401
Answer by letter-Burns

Honorable Donald L. Manford
State Senator, 8th District
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This is in answer to your letter of recent date in which you state that you made a request for an official opinion from this office which was received July 19, 1971, relating to the Governor's power to veto certain "footnote" language found in most of the appropriation bills of the 76th General Assembly which we declined to answer on the ground that the request did not relate to your official duties as state senator. In your request you stated that our opinion was requested because one of your constituents submitted such a request to you. It is our view that a state senator has no official duty to advise one of his constituents as to legal matters and for that reason we declined to issue an official opinion.

It is our view, however, that the present request does relate to your official duties as state senator because the request is apparently being made to determine the validity of certain language in an appropriation act in relationship to your duties as state senator, and more particularly, as chairman of the Senate Appropriations Committee.

We believe that it is unnecessary to rule on the question as to whether or not the Governor has the power to veto "footnote" language found in most of the appropriation bills of the First Session of the 76th General Assembly. We adopt this view because it is our holding that such "footnote" language is unconstitutional, invalid and void because it is an attempt to enact general legislation in an appropriation act. The "footnote"

Honorable Donald L. Manford

language to which you refer is, as we understand it, that found in practically all the appropriation acts of the First Session of the 76th General Assembly. We set out as illustrative the "footnote" language in Conference Committee Substitute for House Bill No. 4 of the First Session of the 76th General Assembly. Such "footnote" language provides as follows:

"THE APPROPRIATIONS IN THIS BILL ARE THE TOTAL APPROPRIATIONS FOR EACH AGENCY OR PROGRAM FOR THE ENTIRE FISCAL PERIOD FROM JULY 1, 1971 THROUGH JUNE 30, 1972. AGENCY AND PROGRAM ADMINISTRATORS SHALL BUDGET THE APPROPRIATIONS HEREIN THROUGH A FULL 12 MONTH PERIOD. THE TOTAL APPROPRIATIONS IN THIS BILL ARE INTENDED TO BE EXPENDED THROUGH A FULL TWELVE MONTH PERIOD. DURING THE MONTH OF JULY, 1971, EACH AGENCY NAMED IN THIS BILL, SHALL SUBMIT BY ITS PROGRAM ADMINISTRATOR, TO THE COMMITTEE ON STATE FISCAL AFFAIRS, A TWELVE MONTH PLAN OF EXPENDITURES WHICH SHALL DETAIL ESTIMATED PLANNED EXPENDITURES DURING EACH MONTH OF THE FULL TWELVE MONTH PERIOD. NO EXPENDITURE SHALL EXCEED SUCH ESTIMATE, IN ANY ONE MONTH, BY AN AMOUNT GREATER THAN 15% OF SUCH ESTIMATE WITHOUT PRIOR APPROVAL OF THE COMMITTEE ON STATE FISCAL AFFAIRS.

"*PERSONAL SERVICE (Non-Merit Employees)
The intent of the Personal Service appropriation is to allow a 15% increase for employees receiving less than \$5400 per year; a 10% increase for employees receiving \$5400 to \$6888 per year; and a 5% increase for employees receiving \$6888 to \$8400 per year. All employees that are not statutory and that are not included in the above scale are allowed a \$300 per year increase only.

"**PERSONAL SERVICE (Merit System Employees)
Merit System employees' salaries include the rates as provided in House Bill 16, 76th General Assembly. All employees that are not statutory and were not included in House Bill 16 are allowed a \$300 per year salary increase."

We are enclosing Opinion No. 378 rendered July 21, 1971, to H. Duane Pemberton, which rules specifically as to the first asterisk footnote in House Bill No. 4, that is, the one relating to

Honorable Donald L. Manford

personal service (non-merit employees) and holds that such provision is unconstitutional, invalid and void. We believe that the holding in such opinion is equally applicable to the other "footnote" language found at the end of such bill. It is our view that the language contained in such footnotes is clearly an attempt to enact general legislation in an appropriation act. We therefore hold it to be invalid and void.

We are also enclosing Opinion No. 10 rendered June 11, 1953, to I. T. Bode, referred to in the opinion, No. 378, 1971. Opinion No. 10 held that a provision in an appropriation act was void and invalid when such provision purported to prohibit expenditure for the rental or erection of a building where used as a central office building for the Conservation Commission and purported to prohibit the expenditure of any funds except in accordance with the budget regularly adopted by the Conservation Commission for a certain period.

We are enclosing Opinion No. 3 rendered April 16, 1953, to Newton Atterbury, which held invalid a provision in an appropriation bill, such provision purporting to prohibit the payment of more than one-half of wolf, coyote or wildcat bounties by the state in view of the fact that a state statute provided that the state should pay two-thirds of all such bounties.

We are enclosing an opinion rendered December 3, 1951, to Bert Cooper, holding that the passage of an appropriation act subsequent to the last date authorized for an appropriation act by a general statute of the state would be ineffective, invalid and void and that such an appropriation act would be a nullity.

We are enclosing an opinion rendered March 8, 1939, to Jewell Mayes, which holds that where a statute creating an office provides for payment for travel only within the state, an appropriation act providing for payment for travel for such officer within and without the state is invalid and void insofar as travel without the state is concerned because it is an attempt to pass general legislation in an appropriation act and is unconstitutional.

We are enclosing Opinion No. 89 rendered May 29, 1958, to William E. Towell, which holds that an appropriation act attempting to prohibit salary increases for employees is invalid, void and unconstitutional as an attempt to pass general legislation in an appropriation act.

It is apparent that this office has over a long period of years held that general legislation cannot be enacted validly in an appropriation act and that any attempt to do so renders void, invalid and nugatory the provisions of general legislation included in such appropriation act. In view of the fact that it is clear that the "footnote" language on most of the appropriation bills of the First Session of the 76th General Assembly is

Honorable Donald L. Manford

unconstitutional, invalid and void because it is an attempt to enact general legislation in an appropriation act, we find it unnecessary to determine whether or not the Governor has the power to veto such "footnote" provisions.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 378
7-21-71, Pemberton

Op. No. 10
6-11-53, Bode

Op. No. 3
4-16-53, Atterbury

Op. No. 19
12-3-51, Cooper

Op. No. 57
3-8-39, Mayes

Op. No. 89
5-29-58, Towell



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

September 3, 1971

OPINION LETTER NO. 402

Honorable William J. Esely
Senator, District 12
1414 Main
Bethany, Missouri 64424

Dear Senator Esely:

This letter is in response to your opinion request in which you ask:

"In the event of a contested township election, whereby, in the plaintiffs' petition the legality of the entire election is challenged, do the old Township Board members, collector, assessor and clerk carry over in their official capacities until the election contest is finally decided? If not, then who are the legal Township officers, how and by whom are they determined?"

It is our understanding that the persons who claim the right to the offices involved have not given bond, qualified or taken the oath of office. It is also our understanding that no appointments have been made under Section 65.200, RSMo 1969, relative to appointments of officers when persons elected fail to qualify. The question presented is whether township officers who were in office at the time of the election have the authority to hold office until their successors are chosen and qualified.

Section 65.190, RSMo 1969, provides in part:

"...Township officers shall hold their offices for two years, and until their successors are chosen or appointed and qualified."

Honorable William J. Esely

This provision is consistent with Section 12, Article VII of the Missouri Constitution which provides:

"Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In our view the above provision of the Missouri Constitution as well as Section 65.190 applies to such officers. State v. Davis, 418 S.W.2d 163 (1967), Davenport v. Tetters, 315 S.W.2d 641 (1958).

We note that in State v. Davis, above, the Supreme Court of Missouri in interpreting the provisions of Section 12, Article VII of the Missouri Constitution and of Section 105.010, RSMo 1969, which relates to public officers generally and is similar in context to Section 65.190, noted with approval the holding of that court in Langston v. Howell County, 79 S.W.2d 99 (1934) that:

"During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches."

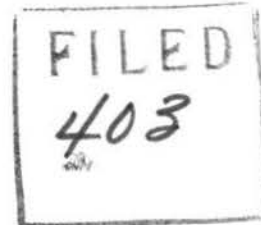
We conclude, in the premises, as there are no other controlling constitutional provisions, that such township officers hold office for their term of office and until such time as their successors are duly elected or appointed and qualified.

Very truly yours,

JOHN C. DANFORTH
Attorney General

September 22, 1971

OPINION LETTER NO. 403
Answer by Letter - Klaffenbach



Honorable Robert A. Young
Missouri Senate, District 24
3500 Adie Road
St. Ann, Missouri 63074

Dear Senator Young:

This letter is in response to your opinion request which is stated as follows:

"Clarification and ruling under Article 6, Section 18c of special charters, 1945 Missouri Constitution Revised 1961, with respect to proposed county-wide elections for the purpose of authorizing the county governing body to provide the terms upon which the county shall perform the services and functions of:

- (a) Uniform regulation and enforcement of building construction throughout the county,
- (b) Adoption and enforcement of a minimum housing code throughout the county,
- (c) Creation of a police standards commission; to provide for the establishing of minimum performance standards for police departments within the county.

"Specific clarification is requested concerning the manner of acceptance or rejection of these proposed ordinances by the electors.

"Is a simple majority vote required in each separate municipality, or political subdivision in the county?

Honorable Robert A. Young

"Can acceptance or rejection of these proposed ordinances be determined legally on the basis of a total county vote? Superiority of the ordinances of a city or municipality, versus ordinances of county when in apparent conflict. Which is the higher legal entity, and which charter is superior?"

We first wish to call to your attention that the amendment to Section 18(c) of Article VI of the Missouri Constitution was adopted at the general election November 3, 1970. The amended section is as follows:

"The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county may contract with any municipality or political subdivision in the county and perform any of the services and functions of any such municipality or political subdivision.

"The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, throughout the entire county within as well as outside incorporated municipalities; any such charter provision shall set forth the limits within which the municipalities may exercise the same power collaterally and coextensively. When such a proposition is submitted to the voters of the County the ballot shall contain a clear definition of the power, function or service to be performed and the method by which it will be financed."

We do not have the particular proposals that you mentioned in front of us and therefore do not pass upon the precise question as to whether or not they fall within Section 18(c) of Article VI. With respect to the County Charter, it is clear that under Section 18(b) of Article VI of the Missouri Constitution:

"The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of

Honorable Robert A. Young

office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of the state." (Emphasis added)

We note also that Article X of the St. Louis County Charter with respect to such amendments provides in part:

"Section 10.010. This charter may be repealed, revised or amended in any one of the following ways:

(1) In the manner provided in the state constitution for the framing and adopting of a county charter;

(2) By ordinance adopted by the council and submitted to the voters at a general or special election and approved by a majority of those voting on the proposition;

(3) By petitions setting forth the proposal and adopted by the voters in the manner hereinafter provided. Such petitions shall be signed by qualified voters equal in number to at least five percent of the total vote cast for governor in each of the council districts at the last election at which a governor was chosen. Each petition shall contain the full text of the proposal and an enacting clause which shall read as follows: 'Be it resolved by the people of St. Louis County that the county charter be amended (or repealed, or revised):'. The petitions shall be filed with the office or officer charged with conducting elections in the county which shall determine their sufficiency. The proposal shall be submitted to the voters at the next general election occurring not less than ninety days after the petitions are filed. An affirmative vote of a majority of those voting on any proposal shall be sufficient for its adoption;

(4) By direct submission by charter commission to the qualified voters in the manner hereinafter provided."

Therefore, under Section 18(c) of Article VI of the Missouri Constitution the Charter may provide for the vesting and exercise of legislative power as prescribed therein. Under Section 18(b)

Honorable Robert A. Young

of Article VI, amendments to the Charter in implementation of Section 18(c) of Article VI must be made pursuant to the Charter provisions providing for Charter amendments. We conclude with respect to your question as to the adoption of such Charter amendments that any amendment to the Charter will either be adopted or rejected by the voters of the County and that it is immaterial as to how the voters of any particular municipality or political subdivision vote.

With respect to your question asking whether the provisions of the County Charter or of the charter of a city within the County prevail if there are contradictory provisions in such charters, it is clear that under the provisions of the second paragraph of Section 18(c) of Article VI of the Missouri Constitution the provisions of the County Charter prevail.

Very truly yours,

JOHN C. DANFORTH
Attorney General

LAND SURVEYOR:
COUNTY SURVEYORS:

A duly elected county surveyor cannot practice as a land surveyor in this state as defined in Section 327.272, RSMo 1969, unless he has been duly registered as a land surveyor under Chapter 327, RSMo 1969.

OPINION NO. 405

November 15, 1971

Honorable Ray Lee Caskey
Prosecuting Attorney
Oregon County
P. O. Box 278
Alton, Missouri 65606



Dear Mr. Caskey:

This is in response to your request for an opinion from this office concerning the following matter:

"Is a duly elected County Surveyor who has not been duly registered as a land surveyor in Missouri by 'The Missouri Board for Architects, Professional Engineer's and Land Surveyors', prohibited from practicing as a land surveyor by Section 327.281 RSMo, as that practice is defined in Section 327.272 RSMo. within the county for which he was elected. and in this connection, has the 1969 Legislature enacting the new Sections 327.272-281 changed the law in Missouri to the point that that part of Attorney General's Opinion Number 146, Niewoehner, issued 14 May 1968, which held that a duly elected and subsequently qualifying county surveyor who is not a registered land surveyor could 'perform the duties of County Surveyor within the county for which he was elected' cannot be considered applicable as authority under the new statute?"

On May 14, 1968, this office issued an opinion to the effect that county surveyors when duly qualified may perform surveys for the general public within the county for which they were elected without being a duly registered land surveyor. At that time Section 344.020, RSMo 1959, provided as follows:

"It shall be unlawful for any person to practice, or offer to practice, or to in any manner advertise or indicate to the public that

Honorable Ray Lee Caskey

he is engaged in, or will engage in the practice of land surveying in this state, without first registering with the state board of registration for architects and professional engineers, as a land surveyor."

In 1969 the legislature enacted Senate Bill No. 117 which repealed Section 344.020, RSMo 1959, and enacted a new section which is now Section 327.281, RSMo 1969, which provides as follows:

"No person, including any duly elected county surveyor, shall practice as a land surveyor in Missouri as defined in section 327.272 unless and until the board has issued to him a certificate of registration or a certificate of authority certifying that he has been duly registered as a land surveyor in Missouri, and unless such certificate has been renewed each year as hereinafter specified." (emphasis supplied)

The cardinal rule of statutory construction is to ascertain the intention of the lawmaking body and, as far as possible, give effect to the intention expressed. *Household Finance Corporation v. Robertson*, 364 S.W.2d 595 (Mo. banc 1963). The legislature is presumed to know prior construction of original acts, and an amendment substituting a new phrase from one previously construed generally indicates an intention that a different interpretation be given the new phrase. *Salitan v. Carter, Ealey and Dinwiddie*, 332 S.W.2d 11 (K.C.Ct.App. 1960). Amendatory statutes should be construed on the theory that the legislature intended something by the amendment. *Holt v. Rea*, 330 Mo. 1237, 52 S.W.2d 877 (1932).

It is the opinion of this office that the legislature when it repealed Section 344.020, RSMo 1959, and enacted a new section which is now Section 327.281, RSMo 1969, which expressly prohibits any duly elected county surveyor from the practice of land surveying as defined in Section 327.272, RSMo 1969, unless he has a certificate as a land surveyor, was familiar with the former interpretation of this statute, and consequently, enacted this amendment to prohibit a county surveyor from the practice of surveying unless duly registered.

Opinion No. 146 issued May 14, 1968, is hereby withdrawn.

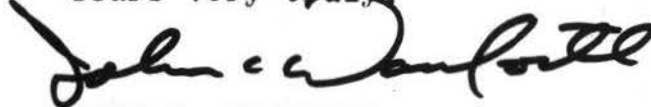
CONCLUSION

It is the opinion of this office that a duly elected county surveyor cannot practice as a land surveyor in this state as defined in Section 327.272, RSMo 1969, unless he has been duly registered as a land surveyor under Chapter 327, RSMo 1969.

Honorable Ray Lee Caskey

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

BONDS:
SEWERS:

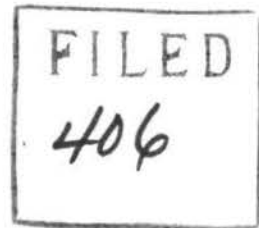
A sewer district in a second class county organized pursuant to Sections 249.760 through 249.810, RSMo

1969, may issue revenue bonds in the manner provided by Section 249.800, RSMo 1969.

OPINION NO. 406

December 14, 1971

Honorable Joe A. Johnson
Prosecuting Attorney
Jefferson County
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Johnson:

This is in reply to your request for an official opinion of this office concerning the question whether a sewer district in a second class county organized under Chapter 249, RSMo, can issue revenue bonds without approval by the voters. The question is asked because you state there is an apparent conflict between Sections 249.760 through 249.810, RSMo, enacted in 1961, with Chapter 250, RSMo, enacted in 1951.

Chapter 249 provides for the creation of sewer districts in various classes of counties, and Sections 249.760 through 249.810 provide for sewer districts in second class counties. From the facts you have stated, we assume that the revenue bonds will be used for authorized purposes within the powers of the district as provided in Section 249.777.9, RSMo.

Therefore, the revenue bonds to be issued would be pursuant to Section 249.797, RSMo. In such instance Section 249.800, RSMo, provides as follows:

"The board of any district contemplating the issuance of revenue bonds under the provisions of sections 249.760 to 249.810 may give notice of its intention to issue the bonds without submitting the proposition to the voters of the district, the notice to state the maximum amount of bonds proposed to be issued and the general purpose of the bonds. The notice shall further state the right of the owners of real property in the district to file their written protest against the issuance of the bonds as hereinafter provided. The notice shall be published twice in a newspaper published in the

Honorable Joe A. Johnson

county in which the district is located. If within fifteen days after the date of the first publication of the notice there shall not be filed with the secretary of the district a written protest against issuance of such revenue bonds, signed by the record owners of not less than forty percent of the assessed valuation of the property within the sewer district, the board of the district shall have power to issue the revenue bonds of the district to the amount and for the purpose specified in the notice without an election. If within fifteen days after the date of the first publication of the notice there is filed with the secretary of the district a written protest against the issuance of the revenue bonds signed by the record owners of not less than forty percent of the assessed valuation of the property within the sewer district, the board of the district shall thereupon submit the proposed revenue bond issue to the electors of the district at a special election to be called for that purpose at a meeting called by the board, and, if at the election the owners of a majority of the assessed valuation of the property within the district voting on the proposition shall vote in favor thereof, the proposed improvements may be made and the revenue bonds issued in payment of the cost thereof."

However, as stated in your request, there appears to be a conflict with Section 250.070, RSMo, which is applicable to sewer districts organized under Chapter 249, RSMo, and which provides in part:

"1. No such city, town or village or sewer district shall issue or deliver any bonds for the purpose of acquiring, constructing, improving or extending any such sewerage system or combined waterworks and sewerage system payable from the revenues to be derived from the operation of any such system unless a proposition to issue such bonds shall have received the assent of four-sevenths of the qualified voters of such city, town or village or sewer district who shall vote on such proposition at an election, either general or special."

Honorable Joe A. Johnson

The question then is one of legislative intent and the applicable rule of statutory construction is that specific statutory provisions prevail over general provisions. State ex rel. Baker v. Goodman, 274 S.W.2d 293 (Mo. banc 1954). This is so even if the general provision is the later law. State ex rel. Monier v. Crawford, 303 Mo. 652, 262 S.W. 341 (banc 1924).

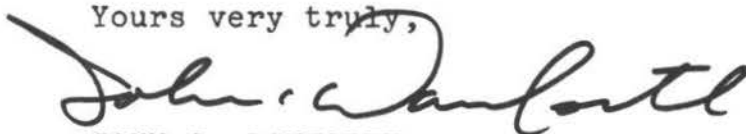
Therefore, since Section 249.800 is a specific provision on the manner of issuing revenue bonds by sewer districts in second class counties, it is our opinion that this provision prevails over the earlier general provisions of Section 250.070.

CONCLUSION

It is the opinion of this office that a sewer district in a second class county organized pursuant to Sections 249.760 through 249.810, RSMo 1969, may issue revenue bonds in the manner provided by Section 249.800, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

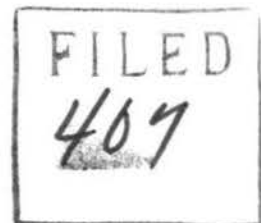
Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH
Attorney General

December 10, 1971

OPINION LETTER NO. 407
Answer by letter-Nowotny



Mr. Carl R. Noren, Director
Missouri Department of Conservation
P. O. Box 180
Jefferson City, Missouri 65101

Dear Mr. Noren:

This is in reply to your request for an official opinion as to whether the phrase "displaced person" under the provisions of Public Law 91-646, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, applies only to persons forced to relocate because of condemnation action or similar measures, or whether the term includes persons from whom land is acquired by negotiation without resort to the exercise of the power of eminent domain.

We do not ordinarily give opinions interpreting federal law as that should be in the province of the appropriate federal officials. However, since a difference of opinion exists between your office and the federal officials, it is necessary in this case to advise you of our opinion so that you may properly perform your duties as to relocation assistance.

From the facts you have stated, we assume the property acquisitions involved will be funded entirely or in part from federal funds. We first observe, therefore, that House Bill No. 94, 76th General Assembly, is not applicable. See Opinion Letter No. 314, September 29, 1971, Dunkeson.

Therefore, the question depends on the definition of "displaced person" in Section 101(3) of Title I, P.L. 91-646, reading as follows:

"The term 'displaced person' means any person who, on or after the effective date of the act,

Mr. Carl R. Noren

moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any other authorized person to vacate such property, for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired."

We find no language limiting this definition to those persons who are forced to move because of the exercise of the power of eminent domain. The language simply includes all persons who move as a result of the acquisition of real property. Therefore, we conclude that such definition of "displaced person" includes those persons who relocate, from whom land is acquired by negotiation without resort to the exercise of the power of eminent domain.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Ltr. No. 314
9-29-71, Dunkeson

November 17, 1971

OPINION LETTER NO. 408

Mr. William Y. McCaskill, C.L.U.
Superintendent
Division of Insurance
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

Pursuant to your request of October 27, 1971, an examination has been made of an executed copy of Declaration of Intention and Articles of Incorporation of the First American Insurance Company for the purpose of examination as provided for in Section 379.040, RSMo 1969.

It is the opinion of this office that the Declaration of Intention and Articles of Incorporation of First American Insurance Company are in conformity with the provisions of Sections 379.010 through 379.160, RSMo 1969, and not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion which I hereby approve, was prepared by my assistant, Alfred C. Sikes.

Yours very truly,

JOHN C. DANFORTH
Attorney General

BONDS: A fourth class city may issue
LANDFILLS: general obligation bonds for the
CITIES, TOWNS & VILLAGES: purpose of acquiring land and
developing the same for a landfill to be used for the disposition of garbage, trash, refuse matter and municipal waste and that the landfill may be outside the corporate limits of the city with no restriction on the distance from the city.

OPINION NO. 409

November 11, 1971

Honorable Robert E. Young
Representative, District 133
208 West Macon Street
Carthage, Missouri 64836



Dear Representative Young:

This is in response to your request for an opinion on the following questions:

- "1. May a city of the fourth class in Missouri under the statutes of law vote and issue general obligation bonds for the purpose of acquiring land and developing the same for a landfill to be used for the disposition of garbage, trash, refuse matter and municipal waste?
- "2. If the Statutes of Missouri authorize the same, may the landfill site be situated outside the corporate limits of the city, and if so within what distance from the city?"

With respect to your first question, we find no statutory provision which expressly authorizes a fourth class city to acquire land for a landfill. However, Section 71.680, RSMo 1969, provides in part:

"In addition to their other powers for the protection of the public health, each city of the . . . fourth class of this state, . . . may provide for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities either by itself, or by contract with others,

Honorable Robert E. Young

. . . and may do such other and further acts as are expedient for the protection and preservation of the public health, as the public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste. . . ."

Section 79.690, RSMo 1969, provides:

"Such cities may pass all ordinances necessary for the carrying into effect of the powers granted in section 71.680."

It is our opinion that the acquisition of land for a landfill to be used for the disposition of garbage, trash, and refuse matter is lawful under Section 71.680, RSMo, since a landfill would be a means to the end of ". . . gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities. . . ." In addition, the purchase of land for a landfill for such purposes would be an act which furthers the objective of protecting and preserving the public health and, therefore, would be permissible under the language of Section 71.680, RSMo, which permits a city to do ". . . such other and further acts as are expedient for the protection and preservation of the public health, as the public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste. . . ."

With respect to issuing bonds to pay the cost of acquiring and developing land for a landfill for the purposes mentioned in your opinion request, Article V, Section 26(b) and (c) of the Missouri Constitution, read together, permit a city to become indebted up to ten percent of the value, for state and county purposes, of taxable property located within the city upon approval of two-thirds of the voters of the city. Implementing those constitutional provisions are several sections in Chapter 95, RSMo 1969. Noteworthy are Sections 95.115 and 95.120, RSMo 1969, which permit a city to become indebted for any purpose authorized "by any general law of this state" (Section 95.115, RSMo); and for ". . . city purposes authorized . . . by any general law of this state, . . ." (Section 95.120, RSMo).

Since we have already ruled that the acquisition of land for a landfill to be used for the purposes mentioned in your opinion request is permissible under Section 71.680, RSMo, that purpose is a city purpose authorized by a law of this state for which bonded indebtedness may be incurred in conformity with the Constitution and statutes of this state.

Honorable Robert E. Young

Your second question asks whether the landfill site may be located outside the corporate limits of the city. Here we find no statute either expressly authorizing the acquisition and holding of land outside the corporate limits of the city for such purpose or any statute prohibiting the acquisition and holding of land outside of the city for such purpose. Section 79.010, RSMo 1969, provides:

"Any city of the fourth class in this state may become a body corporate under the provisions of this chapter, in the manner provided by law, under the name of 'The city of', and by that name shall have perpetual succession, may sue and be sued, implead and be impleaded, defend and be defended in all courts of law and equity and in all actions whatever; may receive and hold property, both real and personal, within such city, and may purchase, receive and hold real estate within or without such city for the burial of the dead; and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire; may receive bequests, gifts and donations of all kinds of property, and may have and hold one common seal, and may break, change or alter the same at pleasure, and all courts of this state shall take judicial notice thereof." (emphasis added)

The underlined portion of that section gives the city the general authority to purchase land without limitation as to location except as specifically limited by other statutes. Reading the underlined portion of that section in conjunction with the authority to establish a landfill which we have already held is authorized by Section 71.680, RSMo, we conclude the city may purchase land outside its corporate limits for the purposes authorized by Section 71.680, RSMo.

Language of the Supreme Court of Missouri in *Hafner v. City of St. Louis*, 161 Mo. 34, 61 S.W. 632, 634 (1901) is in accord with this position. The opinion states:

". . . That the city of St. Louis has authority to purchase real estate under proper conditions and for particular purposes cannot be questioned. By section 1 (Rev. St. 1845, c. 34) of the act concerning corporations, in force when this wharf deed was executed, among its enumerated powers appears the following:

Honorable Robert A. Young

'To hold, purchase and convey such real estate as the purposes of the corporation shall require, not exceeding the amount limited by its charter.' By the charter of the city upon that subject, then in force, it also in express terms provided that 'the city may purchase, receive and hold property, real and personal, beyond its limits, to be used for the burial of the dead, for the establishment of hospitals, for the receipt of persons infected with contagious and other diseases, for the establishment of a poor house, work house, or house of correction, and for the establishment of waterworks to supply its city with water,' etc.

"Though, among the enumerated charter powers of the city at that time in force, no express power is conferred upon the city of St. Louis to purchase, hold, or receive land for wharf purposes beyond its corporate limits, and while it is true that the city, in that regard, must act within the express or implied authorization of its charter, by reading its charter powers in connection with its general authority under the statute 'to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited by its charter,' and remembering that no express restriction is found in the city charter against the purchase of real estate for wharf purposes, it would seem that the city, under its general statutory power, could receive and hold such property, beyond its corporate limits, not prohibited by its charter, and essentially necessary for the purpose of carrying out one of its proper corporate functions and duties, as the establishment, construction, and maintenance of a general wharf system along its river front, and by further bearing in mind the fact that in so doing the beginning or termination of a perfect wharf system must of necessity involve a disregard of the exact corporation limits of the city as at the particular time established. In our opinion, the mere directory power of the charter as to the right of the city to purchase, hold, and receive real estate outside of the corporate

Honorable Robert E. Young

limits of the city for particular designated purposes should not be construed as an absolute limitation upon the general power conferred upon the city, under section 1 of the statute concerning corporations above cited, to purchase and hold real estate wherever located, when it becomes necessary for the purposes of the corporation. The necessities of the city, under the statute, constitute ample warrant for the purchase of land, wherever located, for other purposes than those designated in its charter; . . ."

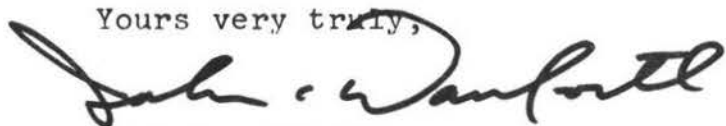
Based on that decision, we believe a city may acquire land outside its corporate limits for a landfill to be used for the purposes mentioned in your opinion request. Further, we believe that there is no limitation on the distance such land may be from the corporate limits of the city.

CONCLUSION

It is the opinion of this office that a fourth class city may issue general obligation bonds for the purpose of acquiring land and developing the same for a landfill to be used for the disposition of garbage, trash, refuse matter and municipal waste and that the landfill may be outside the corporate limits of the city with no restriction on the distance from the city.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

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JOHN C. DANFORTH
Attorney General

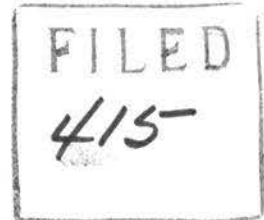
COUNTY HEALTH CENTER
PROSECUTING ATTORNEY
SHERIFFS
DEPUTY SHERIFFS

The trustees of the Taney County Health Center may appoint personnel on a full or part-time basis to investigate and enforce violations of environmental laws and regulations.

December 21, 1971

OPINION NO. 415

Honorable Peter H. Rea
Prosecuting Attorney
Taney County
Box 27
Branson, Missouri 65616



Dear Mr. Rea:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"Would the Health Center Trustees, in a 3rd class county, be authorized and empowered to expend funds from the Health Center treasury received from the people in the 10-cent levy, for purposes of paying an investigator working under the Prosecuting Attorney whose job description is in the field of ecology, to-wit: The enforcement of statutes relating to water pollution in the county and to investigate complaints of citizens relating to the general field of ecology?"

You have stated that the Health Center trustees would contribute \$1,500 as part payment of the salary of a Taney County water patrolman who will be commissioned a deputy sheriff and who will act as an investigator for the prosecuting attorney's office. The primary duties of the patrolman would be to investigate and enforce environmental laws and regulations on such problems as water pollution, dumping and trash disposal, and septic tank and sewage disposal. This person would operate on Lake Taneycomo, Bull Shoals, Table Rock, and the many streams of Taney County.

Honorable Peter H. Rea

Of course, as stated in your opinion request, this officer would also enforce other criminal laws relating to violations on these water areas.

Section 205.010, RSMo 1969, provides for the creation of county health centers and the assessment and levy of a tax for such purposes. You have stated that Taney County has established such a center and presently has some \$37,000 accumulated from the tax.

Such funds are to be expended for the following purpose:

"The board of health center trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the county health center as may be deemed expedient for the economic and equitable conduct thereof. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees." Section 205.042.4, RSMo 1969.

In addition the trustees may appoint personnel as follows:

"The board of health center trustees may appoint and remove such personnel as may be necessary and fix their compensation; and shall in general carry out the spirit and intent of sections 205.010 to 205.155 pertaining to establishing and maintaining a county health center." Section 205.042.5, RSMo 1969.

The question then is whether such a person would be appointed to carry out the spirit and intent of Sections 205.010 to 205.155, RSMo 1969.

Honorable Peter H. Rea

The only provision answering this question is Section 205.050, RSMo 1969, which provides:

"The public health center is established, maintained and operated for the improvement of health of all inhabitants of said county or counties."

It is our opinion that the term "public health center" is not strictly limited to a "building or facility." Therefore, it is appropriate for the trustees of the public health center to appoint personnel whose duties are to maintain and improve the health of the inhabitants of the county even though they do not necessarily operate out of any building or facility designated as the public health center.

The important question is whether such a person who is investigating such environmental problems as water pollution and waste disposal is working to maintain and improve health. It is our further opinion that such a person would be meeting the purposes of Sections 205.010 through 205.155.

In reaching this conclusion, we note that in the Missouri Water Pollution Law, Chapter 204, RSMo, "pollution" is defined as the discharge of sewage or wastes into waters of the state to such an extent as to be detrimental to "public health." Section 204.010(5), RSMo 1969. Also, in the Missouri Air Conservation Law, Chapter 203, RSMo, "air pollution" is defined as the presence of air contaminants causing or contributing to injury to "health." Section 203.020(4), RSMo 1969.

Thus, it is apparent that investigating and enforcing environmental problems is related to maintaining and improving the health of the inhabitants of Taney County.

CONCLUSION

It is the opinion of this office that the trustees of the Taney County Health Center may appoint personnel on a full or part-time basis to investigate and enforce violations of environmental laws and regulations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

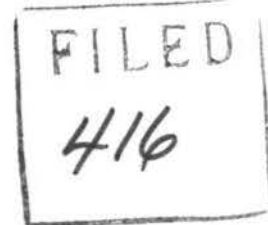


JOHN C. DANFORTH
Attorney General

September 16, 1971

OPINION LETTER NO. 416
Answer by Letter - Klaffenbach

Honorable Donald L. Manford
Missouri Senate, District 8
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This letter is in answer to your opinion request in which you ask whether under the provisions of Senate Bill No. 318 of the 76th General Assembly, state agencies under the control of the Governor are required to provide information and access to their books and accounts, reports, vouchers, correspondence files and all other records and property to the Committee on State Fiscal Affairs or whether such agencies are prohibited from doing so by reason of an executive order.

We assume that the information and records to be requested will be germane to the functions and duties of the Committee.

You indicate in your opinion request that the Governor issued an executive order prohibiting "such information by some agencies" and that the Governor then signed Senate Bill No. 318 effective September 28, 1971, amending Section 21.500, RSMo 1969.

First of all we note that the only change made in Section 21.500, RSMo 1969 by Senate Bill No. 318 was to add paragraph 5 which requires the Committee to compile and distribute to the members of the General Assembly a compendium of federal funds received and expended by all state agencies and institutions of higher education. The pertinent portion of that section to which you refer is Subsection 4 which was not changed and which states:

"The committee and its staff may use information and data made available to it by the state auditor and state comptroller and, on

Honorable Donald L. Manford

written request of the committee, state departments, divisions, institutions and agencies shall provide information and access to their books, accounts, reports, vouchers, correspondence files and all other records and property. The access to such information, records and accounts shall be secondary to their use by the auditor and comptroller in the performance of their official duties, except that the priority of the auditor and comptroller is limited to ten calendar days following a written request for access by the committee."

Subsection 4 is from the laws of 1965, p. 132-133, and pertains literally to "state departments, divisions, institutions and agencies." An executive order contrary to the provisions of that section could not have the effect of invalidating existing law with respect to the subject in question. There would be no constitutional basis to support such an executive order, and in fact, the Missouri Constitution expressly provides that under Section 2 of Article IV, the Governor shall take care that the laws are "faithfully executed."

In answer to your question, we thus conclude that an executive order by the Governor could not interfere with the right of the Committee on State Fiscal Affairs to request and receive information and records under Subsection 4 of Section 21.500.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 6, 1971

OPINION LETTER NO. 418
Answer by Letter - Klaffenbach

Mr. Joseph Jaeger, Jr.
Director
Missouri State Park Board
Post Office Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This letter is in response to your opinion request in which you ask the following questions:

"At this time the Missouri State Park Board is responsible for a State owned property, known as the Old Tavern, located at Arrow Rock, Saline County, Missouri.

In April, 1923 the 52nd Missouri General Assembly approved \$5,000 for purchase of the Old Tavern. The Missouri Society of the Daughters of the American Revolution (D.A.R.) were given custody of the building at that time. During the following years the General Assembly approved additional legislation, and your office issued two formal opinions concerning the operation of this State owned facility. Contracts between the Missouri State Park Board and the D.A.R. have been renewed every two years, since 1948.

Considerable confusion exists concerning the proper role of the Missouri State Park Board as relates to the Old Tavern. This uncertainty centers around the ownership of personal property, for example two portraits by the

Mr. Joseph Jaeger, Jr.

artist George C. Bingham of Dr. and Mrs. John Sappington, responsibility for maintenance of the building, grounds, kitchen equipment, museum objects, etc.) and clearly defined limits of operating procedures between the State Park Board and the D.A.R.

I should like to request your formal opinion as to

- (1) the responsibilities of the Missouri State Park Board pertaining to the Old Tavern,
- (2) the status and role of the D.A.R.,
- (3) responsibility for maintenance in its several forms,
- (4) the legality of current operating contracts between the two parties, and
- (5) the status of personal property located within the historic structure."

We also acknowledge receipt of the report on the history of this subject, with appendices, compiled by Kenneth G. Kombrink, September 1, 1971.

Whatever "custody" rights the Missouri State Society, Daughters of the American Revolution had respecting said site were terminated by the actions of the parties pursuant to the Laws of 1947, Vol. II, p. 310 (H.C.S.H.B. No. 239). Thereafter the Society had only such rights as it acquired by lawful contract with the Board. The Society is thus, with respect to the Park Board, in the position of a concessionaire under Section 253.080, RSMo 1969, and the status and role of such parties are governed by the statutes and the contracts.

Your question concerning the legality of the "current operating contracts" is not sufficiently precise to enable us to render a proper opinion. Such a question in its general form is not a proper question for an opinion under Section 27.040, RSMo 1969, relating to opinions of this office. We reach the same conclusion with respect to your question concerning the responsibility for maintenance in "its several forms."

Mr. Joseph Jaeger, Jr.

The question concerning the ownership of personal property is a question of law and fact and as such is not one which can be decided by an opinion of this office.

Very truly yours,

JOHN C. DANFORTH
Attorney General

November 24, 1971

OPINION LETTER NO. 420
Answer by Letter - Klaffenbach

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Post Office Box 301
Maysville, Missouri 64469



Dear Mr. Paden:

This letter is in answer to your opinion request in which you ask whether the circuit clerk has authority to pay the costs of an action out of a cost deposit made by the plaintiff, after the rendition of a default judgment in which the costs are taxed to a defendant against whom execution cannot be levied.

Without attempting to cover the myriad situations relating to the taxation of costs and deposits for same which are largely set out in Chapter 51⁴ of the Revised Statutes of Missouri and Supreme Court Rules 77.01, et seq., it is our view that a deposit made by a party as security for costs by its very nature is security for the payment of such costs. Even though the deposit was made by the plaintiff and the costs taxed against the defendant, the plaintiff must look to the defendant for recovery. See Hoover v. Missouri Pac. Ry. Co., 21 S.W. 1076 (Mo. 1893) and Baggs v. Lanning, 1 Mo. 261 (1822).

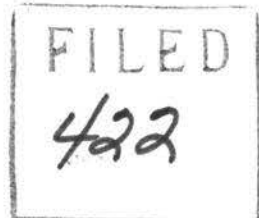
Our answer is therefore that the clerk of the circuit court has authority to pay the costs of such an action out of a deposit made by the plaintiff.

Very truly yours,

JOHN C. DANFORTH
Attorney General

October 12, 1971

OPINION LETTER NO. 422
Answer by letter-Wieler



Honorable John J. Johnson
Senator, District 15
11001 Patrina Court
St. Louis, Missouri 63126

Dear Senator Johnson:

This is in response to your request for an opinion as to the status of a parsonage of a church located 3.8 miles away from the church with respect to the payment of real estate tax. Also, you ask whether a real estate tax exemption can be prorated within a calendar year. It is our understanding that this request is based upon the following facts:

"South Side Assembly of God, 2312 Lemay Ferry Road, St. Louis County, Missouri, 63125, filed a petition for exemption from real estate tax on its parsonage, located at 5300 Kings Park Drive, St. Louis, Missouri 63129, before the Board of Equalization in St. Louis County, Missouri. The Church was informed by the secretary of the Board that as a matter of practice, the Board is refusing exemption on any parsonage located any distance away from the Church (this parsonage is 3.8 miles from the Church which was the closest suitable residence found, the prior exempt parsonage was 4.7 miles from the Church). In addition, since the parsonage was purchased on March 6, 1971, the secretary indicated the matter could not be considered until after January 1, 1972, because the Board could not prorate an exemption for part of a year.

Honorable John J. Johnson

"South Side Assembly of God is a pro forma charitable corporation. The activities taking place at the parsonage are: 1) Residence for Pastor and family, 2) Monthly and special Board meetings for the Directors, 3) Domestic and youth counseling, 4) Guest quarters for visiting Ministers, 5) Marriage performed, 6) Committee meetings, 7) Prayer cells, 8) Youth functions, 9) Study (sermon preparation), and 10) Practice musical arrangements."

In response to your first question, enclosed are two former opinions of this office, Opinion No. 39 issued May 4, 1945, to the Honorable Lane B. Henderson, and Opinion No. 35 issued April 29, 1957, to the Honorable Thomas D. Graham (copies enclosed), which we feel are dispositive of the issue raised. As you will note, the true test for determining exempt status is whether or not the property is used exclusively for religious purposes. The case law cited in our former opinions states that parsonages actually in use by the pastor or church members, and not rented to private individuals, meet this test. The uses for which the parsonage in question is utilized, as outlined in your letter, would certainly entitle the church to claim exempt status for such property.

In our opinion, the distance involved between the parsonage and the church (3.8 miles) is not relevant to the question as to whether such parsonage should be granted exempt status for real estate tax. The test involved here is usage, not location.

With respect to your second question, enclosed is a copy of Opinion No. 66 issued May 31, 1950, to the Honorable O. R. Newcomer which states that real estate acquired by a tax exempt organization after the assessment date remains subject to a lien for taxes for the year in which it was acquired by the tax exempt organization. Inasmuch as the property in question was purchased on March 6, 1971, following the assessment date on January 1, 1971, it is our opinion that the principle set forth in Opinion No. 66 is applicable.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 39
5-4-43, Henderson

Op. No. 35
4-29-57, Graham

Op. No. 66
5-31-50, Newcomer

MENTAL HEALTH:
SEARCHES AND SEIZURES:
CONSTITUTIONAL LAW:
STATE EMPLOYEES:

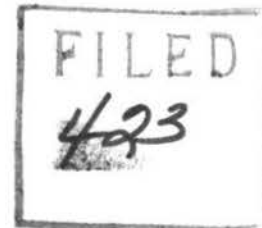
The Division of Mental Health and the superintendents of the facilities within such Division may promulgate reasonable rules requiring employees of the Division or of

such facilities to submit packages and automobiles on facility premises to inspection. Employees who refuse to permit such a search are subject to disciplinary action including discharge.

OPINION NO. 423

November 18, 1971

Mr. Austin Hill, Director
Department of Public Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Hill:

This opinion is in answer to your request in which you ask whether the Division of Mental Health has authority to require by rule and regulation that employees of the various institutions within the Division submit their personal effects and automobiles to inspection while on state grounds for the purpose of controlling contraband and the theft of state property and what action the Division or the institution can take if the employee refuses to be searched in accordance with such rules.

You further advise that under the present regulations of the Division of Mental Health employees are required:

"(4) To submit for inspection, when requested by the Superintendent of the Institution or his representatives, all lockers, packages, purses, briefcases, or bundles carried to, from, or within the Institution. This is also applicable to automotive vehicles parked on the hospital grounds."

The employees handbook, we understand, further provides that employees are forbidden to remove institutional supplies from the premises, to take food items and the like from the kitchen or dining area without express permission or to wear or to use clothing of any kind belonging to the institution except as otherwise provided by institutional rules.

Mr. Austin Hill

You also state that on the entrance way to the institutional grounds signs will be posted advising automobile drivers that cars entering the institution grounds will be subject to search.

The Director of the Division of Mental Health has, "through the office of the superintendent, supervision and direct care over the business management of the several facilities under the control of the division and over their buildings, farm lands, livestock, equipment, machinery and other property." Section 202.035, RSMo 1969. The superintendents of the several major facilities of the Division of Mental Health have "complete charge, control, and management of the entire facility, under the director of the division." Section 202.050, RSMo 1969. And it has been stated with respect to the powers of the superintendent of such institutions that ". . . any well run and efficient organization, be it army, hospital or private business, must have an effective chain of command and it must be responsive, otherwise discipline fails, the organization is disrupted and attainment of the ultimate purposes and objectives become impossible." Merritt v. State Hospital No. 1, Fulton, 403 S.W.2d 940, 943 (K.C.Ct.App. 1966).

The power to make needful rules and regulations inheres in the office of the director and superintendent. Cf. Englehart v. Serena, 300 S.W. 268, 271 (Mo. 1927).

While we find no Missouri cases relative to this question there are several cases decided by the Federal Courts which give us some guidance. That is, the District Court for the Northern District of Georgia, United States v. Crowley, 9 F.2d, 927 (1922), held that a taxicab driver who drove up to the gates of a military reservation was required to submit to search by the military police even though the driver upon being requested to submit to search refused consent and attempted to turn around and leave the reservation. There the court after stating that there was no doubt that one entering a prison or penitentiary may similarly be searched without a warrant held that:

" . . . It is to be remembered that in this case, as in that of the customs house, the object of the search is not to procure evidence of a crime, which would not be permissible, but to prevent a wrongful importation into the camp or country of forbidden articles. A search for this purpose is not unreasonable in law, and may be made instanter and without a warrant. Such a search being lawful, that it incidentally discloses evidence of a crime does not make the evidence inadmissible."

Mr. Austin Hill

In a case involving an employee of the United States Mint, the United States District Court for the Eastern District of Pennsylvania, United States v. Donato, 269 F.Supp 921 (1967), held that where lockers were owned by the United States and a government regulation provided that such lockers are not considered private lockers and that all such lockers were subject to be searched by security guards, such a search was permissible and justified in order to maintain the order and security of the Mint. In another case involving a government employee, the United States Court of Appeals for the Second Circuit in United States v. Collins, 349 F.2d 863 (1965) held that a search based upon regulations and statutes of customs employees' work area was a constitutional exercise of the Government as defendant's employer to supervise and investigate the performance of his duties as a customs employee. The court stated that the necessity of the government to search for lost or stolen mail in a postal area or for lost or stolen property in a customs facility is no less great than the necessity of the military to search a soldier's living quarters for stolen government property.

In a case involving the search of a student's locker, the United States District Court for the Southern District of New York in Overton v. Rieger, 311 F.Supp. 1035 (1970) held that a high school vice-principal had authority to consent to the search of students' lockers as the power to consent follows from an affirmative obligation of the school authorities to supervise children entrusted to their care and the consequent retention of control by such authorities over the lockers. And, the United States District Court for the Middle District of Alabama in Moore v. Student Affairs Committee of Troy State University, 284 F.Supp 725 (1968) held that a rule by the college in which it reserved the right to enter students' rooms for inspection purposes was reasonable as necessary to the institution's performance of its duty to operate the school.

The court stated at l.c. 729:

"...The validity of the regulation authorizing search of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or on whether he has 'contracted' it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words, if the regulation--or, in the absence of a regulation, the action of the college authorities--is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'educational atmosphere,' then it will be presumed facially reasonable

Mr. Austin Hill

despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."

The court continued at l.c. 730, 731, stating:

"This standard of 'reasonable cause to believe' to justify a search by college administrators--even where the sole purpose is to seek evidence of suspected violations of law--is lower than the constitutionally protected criminal law standard of 'probable cause.' This is true because of the special necessities of the student-college relationship and because college disciplinary proceedings are not criminal proceedings in the constitutional sense. . . .

"Assuming that the Fourth Amendment applied to college disciplinary proceedings, the search in this case would not be in violation of it. It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security. A student who lives in a dormitory on campus which he 'rents' from the school waives objection to any reasonable searches conducted pursuant to reasonable and necessary regulations such as this one."

Thus, while we recognize that there may be some difference between the cases noted above and the present situation, there is a workable analogy between those cases and the situation presented with respect to the search of state employees pursuant to notice, as a requirement and as a condition of employment under the authority of reasonable rules designed to protect state property, patients, and the general security of the particular facility.

We conclude that the Division and the institutions within the Division may promulgate reasonable and necessary rules and regulations authorizing the routine search of employees' personal property, including automobiles on the premises, for the purpose of preventing removal of state property from the state premises. It follows that employees refusing to submit to a reasonable search under the particular circumstances are subject to disciplinary action to the same extent as are any such employees who disobey any rules of the Division or of the institution.

Mr. Austin Hill

We do not attempt to answer the question asking whether employees who refuse to be so searched can be searched over their objection. While a waiver of objection to search as such may not be necessary, it is clear that the acceptance of employment or the continuation of employment by an individual constitutes a waiver of objection to search when properly promulgated and reasonable rules and regulations of the Division provide that employees must submit to inspection of packages and motor vehicles of such employees on the grounds of an institution of the Division.

However, the decision in each case will depend on the circumstances and rules then existing governing administration and employment and for that reason this opinion does not cover nor is it intended to authorize a forcible search or seizure of an employee's person or property.

CONCLUSION

It is the opinion of this office that the Division of Mental Health and the superintendents of the facilities within such Division may promulgate reasonable rules requiring employees of the Division or of such facilities to submit packages and automobiles on facility premises to inspection. Employees who refuse to permit such a search are subject to disciplinary action including discharge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

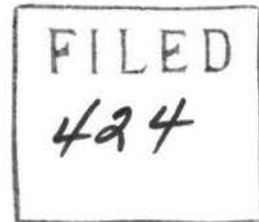
PENSIONS:
PROBATE JUDGES:
MAGISTRATES:
COMPENSATION:

The compensation of a retired probate judge ex-officio magistrate of a county whose population by the 1970 decennial census has increased to over 30,000 inhabitants, who has

been appointed a special commissioner or referee under the provisions of Sections 476.450, RSMo 1969 et seq., is one-third of the salary provided for the office of probate judge of such county as of July 1, 1971.

OPINION NO. 424

October 13, 1971



Mr. John C. Vaughn
Comptroller and Budget Director
State of Missouri
Post Office Box 809
Jefferson City, Missouri 65101

Dear Mr. Vaughn:

This opinion is in answer to your question which is stated as follows:

"Should a retired Probate and Ex-Officio [Magistrate] Judge from a County of under 30,000 population be paid on the basis of a Probate or Magistrate Judge when the official census shows a population in excess of 30,000?"

You add the factual information that:

"Cass County was a County of under 30,000 as shown by the 1960 census, therefore, the elected Probate Judge acted as Ex-Officio Magistrate Judge. A Judge whose termination as Probate Judge and Ex-Officio Magistrate was December 31, 1962 and meeting all of the other requirements, retired as of March 1, 1970 under the provisions of Sections 476.450 and 476.456 RSMo. The official census of 1970 reflected that Cass County had

Mr. John C. Vaughn

a population in excess of 30,000 and therefore were entitled to a separate office of Probate Judge and Magistrate Judge."

Under Section 476.500, RSMo 1969, a probate judge meeting the eligibility requirements of Sections 476.450, RSMo 1969 et seq., may elect to serve as a special commissioner and be subject to call by the Supreme Court of Missouri for temporary duty as provided in Section 476.460, RSMo 1969.

Section 476.450 provides in part that such a judge appointed special commissioner or referee shall:

" . . . while he remains a resident of Missouri, be entitled to and shall receive as annual compensation, salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired, and said sum shall be payable monthly out of the general revenue of the state of Missouri."

Probate judges who are ex-officio magistrates receive compensation in accordance with the classifications set out in Section 482.150, RSMo 1969 since their compensation as magistrate includes their compensation as probate judge. Id., Subsection 2. Probate judges who are not also ex-officio magistrates receive the compensation provided, by classification, under the provisions of Section 481.200, RSMo 1969.

As you have noted the 1970 decennial census determined that Cass County has a population in excess of 30,000 inhabitants whereas under the 1960 census the population was less than 30,000 inhabitants. Prior to July 1, 1971, the probate judge of Cass County was also ex-officio magistrate and as such received a salary of \$12,400 whereas subsequent to that date the probate judge is no longer "judge of the magistrate court" and presently receives a salary of \$13,000. State ex rel. Stark v. Jeter, 467 S.W.2d 882 (Mo. 1971).

The question is therefore whether such a retired probate judge has his salary determined by the statutory classification that applied to him when he retired from the office of probate judge ex-officio magistrate, subject to any increase or decrease that might be forthcoming by reason of a statutory change within the classification, or, whether such a probate judge is entitled to receive, as of July 1, 1971, one-third of the salary now provided in the statutory classification for the office of probate judge of that county.

Mr. John C. Vaughn

In answer, we note that the so called "retirement system" which is provided for such judges, Sections 476.450 et seq., is not a true retirement system but is instead a plan for the compensation of certain judges who are eligible and willing to serve as special commissioners or referees. It is clear that the legislature provided for such salary classifications in order to allow automatic salary increases or decreases to incumbent judges to compensate for changes in the workload of the office. While such special commissioners are not incumbents of the office they are nonetheless subject to duty by order of the Supreme Court and although that duty may be in any court of this state it is reasonable to assume that such service would have some relationship to the office which was vacated.

It is therefore our view that such a judge retired from the office of probate judge is entitled to have his compensation as special commissioner determined on the basis of the compensation now or hereafter provided for the office of probate judge according to population or assessed valuation.

CONCLUSION

It is the opinion of this office that the compensation of a retired probate judge ex-officio magistrate of a county whose population by the 1970 decennial census has increased to over 30,000 inhabitants, who has been appointed a special commissioner or referee under the provisions of Sections 476.450 RSMo 1969 et seq., is one-third of the salary provided for the office of probate judge of such county as of July 1, 1971.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

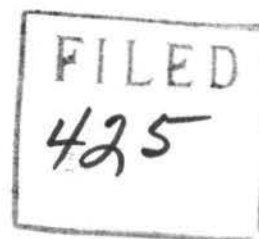
JOHN C. DANFORTH
Attorney General

STATE PURCHASING AGENT:
SCHOOLS:
SCHOOL DISTRICTS:

Junior College districts and
other school districts fall
under the provisions of House
Bill 228, Sections 67.330 through
67.390, RSMo 1969, passed by the Seventy-Fifth General Assembly.

OPINION NO. 425

December 14, 1971



Mr. Robert L. Norris
State Purchasing Agent
Post Office Box 539
Jefferson City, Missouri 65101

Dear Mr. Norris:

This opinion is in response to your opinion request. You ask if junior college districts and other school districts are "political subdivisions of the State of Missouri" within the context of House Bill 228, Sections 67.330 through 67.390, RSMo 1969, passed by the Seventy-Fifth General Assembly.

In State v. Whittle, 33 Mo. 705, 63 S.W.2d 100 (1933), the respondent, a school board member whose ouster was being sought because of the hiring of his first cousin as a teacher in a common school district in Miller County, contended that a school district was not "a political subdivision of the state" and therefore, not within the constitutional prohibition against nepotism. The court rejected respondent's contention stating, l.c. 102:

"The authorities are to the contrary. It is defined by a standard text as follows:
'A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' 56 C. J. 193."

Mr. Robert L. Norris

The court ordered the ouster of respondent. In Smith v. Consolidated School District No. 2, 408 S.W.2d 50 (Mo. Banc, 1966), the court reaffirmed that school districts are political subdivisions.

The phrase "political subdivision of the state" has not received uniform application by the courts of this state. In Kansas City v. Neal, 122 Mo. 232, 26 S.W. 695 (1894), the Supreme Court in discussing a provision out of the 1875 Constitution (Section 12, Article VI), similar to Section 3 of Article V of the Constitution of Missouri 1945, which confers Supreme Court jurisdiction, applied a restrictive interpretation to the phrase "political subdivision of the state". However, it appears that the court's interpretation turned on the fact that the phrase followed the word "county" which is not the case with the use of the phrase in House Bill 228.

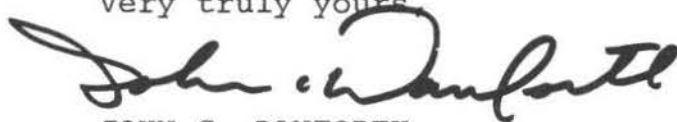
House Bill 228 by its terms seeks to "promote the economy and efficiency of operations of local government". It seems clear that in light of case law defining "political subdivision of the state" to include school districts and the objectives of House Bill 228 that the legislature intended to include junior college districts and other school districts under the provisions of said bill.

CONCLUSION

Therefore, it is the opinion of this office that junior college districts and other school districts fall under the provisions of House Bill 228, Sections 67.330 through 67.390, RSMo 1969, passed by the Seventy-Fifth General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Alfred C. Sikes.

Very truly yours,

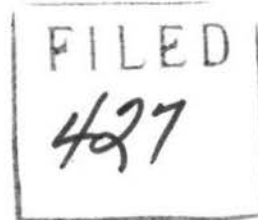


JOHN C. DANFORTH
Attorney General

October 12, 1971

OPINION LETTER NO. 427
Answer by letter-Wieler

Mr. Richard M. Miller, Secretary
Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri 63103



Dear Mr. Miller:

This is in response to your request for an opinion as to the rights and responsibilities of the St. Louis Police Department with respect to an extradition proceeding in which the fugitive has waived extradition from the fugitive state. Specifically, you ask:

- "1) When a prisoner is held in some other state and a warrant has been issued in St. Louis, and the prisoner wishes to waive extradition, what responsibility does the St. Louis Police Department have as to returning him to this City?
- "2) When another law enforcement agency notifies this Department directly that they are holding a fugitive from this state, and the prisoner waives extradition and signs a consent to return, are St. Louis Police Officers 'duly accredited agents' under Section 548.260 (2) for purposes of taking delivery of the prisoner in the other state?
- "3) When this Department returns a prisoner who has waived extradition, how can the expenses of return be recovered from the state?"

With respect to your first question, it is our opinion that the St. Louis Police Department has no responsibility in this matter unless and until a member of the Department has been appointed as

Mr. Richard M. Miller

the Governor's agent for the return of the fugitive to this state. Waiver of extradition by a fugitive only releases the authorities in the asylum state from the duty of issuing a Governor's warrant for the fugitive's arrest and the further responsibility of allowing an opportunity for a habeas corpus hearing in the asylum state for the purpose of determining the legality of his arrest. It does not waive the requirements of Section 548.231, RSMo 1969, calling for an application by the prosecuting attorney to the Governor of this state for the issuance of a requisition on the executive authority of the asylum state for the return of the fugitive or the requirements of Section 548.221, RSMo 1969, which places the duty on the Governor of this state to appoint an agent for the purpose of receiving the fugitive and conveying him to the proper officer of the county in this state in which the offense was committed. Although we realize that fugitives who have waived extradition have been returned to the county in the state in which they were charged with committing a crime by police officers of that county without observing the requirements of these statutes and, further, that such fugitive has no standing to complain of this action, it is our opinion, as a matter of law, that such police officials are not acting as agents of the State of Missouri and have no authority as such.

For this reason, our answer to your second question is in the negative. Section 548.260, RSMo 1969, allows the authorities in this state to deliver a fugitive to a "duly accredited agent or agents of the demanding state" without the issuance of a Governor's warrant or the granting of the right to seek habeas corpus when the fugitive has formally waived such requirements. Similar provisions are contained in the laws of all states which have adopted the Uniform Criminal Extradition Act. As can be seen from the statutes, the only way to become an agent of this state for the purpose of returning a fugitive to this state is to be appointed to such position by the Governor under the provisions of Section 548.221.

In response to your third question, it is our opinion that the expense of returning a fugitive to this state can be paid out of the state treasury only where the person incurring the expenses is the named agent of the Governor under the provisions of Section 548.221. Section 548.241, RSMo 1969, specifically provides:

"1. Except as in this section otherwise provided, all expenses accruing under section 548.221 upon being ascertained to the satisfaction of the governor, shall be allowed on his certificate and paid out of the state treasury as other demands against the state.

"2. Expenses incident to the extradition of any person charged with violating section 559.350, RSMo, shall be paid by the county in which

Mr. Richard M. Miller

the offense is alleged to have been committed. Application for the payment of the expenses shall be made by the agent designated by the governor and filed in the office of the county clerk or of the comptroller of the city of St. Louis. The application shall state the name of the accused and the time, place and pertinent facts of the alleged offense and shall include an itemized statement of the necessary and actual expenses incurred in the extradition of the person and shall be signed and verified by the applicant. The county court or the comptroller of the city of St. Louis, if the application and statement are found correct, shall issue appropriate warrants for the payment of the expenses out of the county or city treasury."

Yours very truly,

JOHN C. DANFORTH
Attorney General

December 2, 1971

OPINION LETTER NO. 433
Answer by Letter - Klaffenbach

Honorable A. Basey Vanlandingham
Missouri Senate, District 19
Post Office Box 711
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This letter is in response to your opinion request which is as follows:

"Section 3, Sub-section 1, of House Bill 33, passed by 75th General Assembly, Third Extra Ordinary Session reads as follows:

'Before any person is licensed as a nursing home administrator in this state, he shall apply for a license and furnish the Missouri board of nursing home administrators with satisfactory proof that he is twenty-one years of age or over, of good moral character, and has had a minimum of three years experience as an employee of a nursing home or equivalent health care facility,'

Under this section and this phraseology, does the Missouri State Board of Administrators have the authority to reject the application for license as a nursing home administrator of a person who is qualified under the equivalent health care facility clause but is not presently an employee or administrator of a nursing home?"

Your question correctly quotes the pertinent portion of Section 344.030, RSMo.

Honorable A. Basey Vanlandingham

In addition to the other qualifications required under Section 344.030, RSMo, which are to be determined by the board under Section 344.050, RSMo, it is clear that the legislature has provided that an applicant who has had a minimum of three years experience as an employee of a nursing home or an equivalent health care facility is eligible to be licensed as a nursing home administrator.

Section 344.010, RSMo defines "nursing home" as:

"[a]ny institution or facility defined as a nursing home for licensing purpose by section 198.011, RSMo, whether proprietary or nonprofit;"

Section 344.030 obviously permits consideration of alternative experience in an "equivalent health care facility." Whether a facility is an "equivalent health care facility" is of course a matter of fact to be determined by the board. There is no statutory requirement, express or implied, that such an applicant who has the requisite experience in such an equivalent facility be presently an employee of a nursing home as defined.

Therefore, a person of good moral character who is twenty-one years of age or over who is qualified under the equivalent provision of Section 344.030 is eligible to be licensed as a nursing home administrator even though he is not at present an employee or administrator of a nursing home.

Very truly yours,

JOHN C. DANFORTH
Attorney General

COUNTIES:

COUNTY COURT:

SCHOOL FUNDS:

COUNTY TREASURER:

Surplus funds received by the county collector from the sale of property for taxes are to be deposited with the county treasurer as provided for under Section 140.230, RSMo

1969, and invested as provided for under Article IX, Section 7, Constitution of Missouri, 1945 and Section 166.131, RSMo 1969.

OPINION NO. 435

December 20, 1971

Honorable James L. Paul
Prosecuting Attorney
McDonald County Courthouse
Pineville, Missouri 64856



Dear Mr. Paul:

This is in response to your request for an opinion from this office in part as follows:

"Is the County Treasurer of a 3rd Class County authorized to invest in time certificates of deposit with a bank, monies received from the Collector at tax sales, which are in excess of the amount of taxes due on said land and are required by law to be held by the Treasurer for 20 years."

You further state that:

"The interpretation of Section 140.230 of the Revised Statutes of the State of Missouri, paragraph (2) has been requested by the County Treasurer as to the possibility of increasing the amount of money that would fall due to either the county or the person claiming."

Section 140.230, RSMo 1969, to which you refer, provides in part that when real estate has been sold for taxes or other debt by a sheriff or collector of any county within the State of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county to pay the surplus money into the county treasury. It further provides:

"2. And said treasurer shall place such moneys to the credit of the school fund of the county,

Honorable James L. Paul

to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county."

We assume from the information you have given us, that twenty years have not elapsed since this money was paid into the county treasury.

Article IX, Section 7, Constitution of Missouri, 1945, provides:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as herein-after provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

This constitutional provision has been implemented by Section 166.131, RSMo 1969, which provides as follows:

"The county court in each county shall administer the county school fund of the county. In each county wherein the annual distribution of the liquidated capital of the county school

Honorable James L. Paul

fund has not been ordered by the voters pursuant to sections 166.151 to 166.171, the proceeds of the fund shall be invested by the county court in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States government and shall be preserved as a county school fund. Annually, on or before August thirty-first, in each county of the state all interest accruing from the investment of the capital of the county school fund, if any, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into the fund, shall be collected and distributed to the school districts of the county by the county clerk upon the basis of the last enumeration on file in his office. He shall immediately after making the apportionments enter them in a book to be kept for that purpose, and shall furnish each district clerk a copy of the apportionment. The county treasurer shall credit each common school district in the county with the amount it is entitled to receive and shall pay over to the treasurer of the school board of every other district in the county the amount due each respective district."

We are enclosing herewith an opinion issued on April 9, 1947, by this office to Honorable Curt M. Vogel, Prosecuting Attorney of Perry County, Perryville, Missouri, in which it was ruled that funds belonging to the public school fund could not be invested in time deposits but have to be invested as provided in Article IX, Section 7, Constitution of Missouri and Section 166.131, RSMo.

It is the opinion of this office that surplus funds received by the county collector from the sale of property for taxes are to be deposited with the county treasurer and become part of the county school fund to be held in trust for twenty years subject to be paid to the owner together with all interest accruing thereon from investment during such period and are to be invested as provided for under Article IX, Section 7, Constitution of Missouri and Section 166.131, RSMo, in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government.

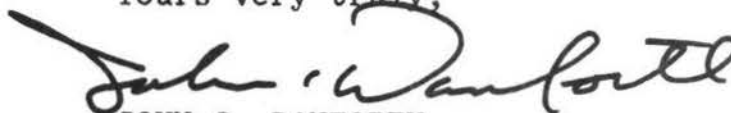
Honorable James L. Paul

CONCLUSION

It is the opinion of this office that surplus funds received by the county collector from the sale of property for taxes are to be deposited with the county treasurer as provided for under Section 140.230, RSMo 1969, and invested as provided for under Article IX, Section 7, Constitution of Missouri, 1945 and Section 166.131, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

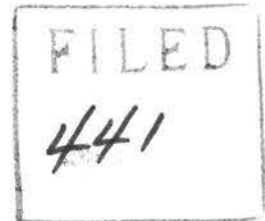
JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 92
4-9-47, Vogel

December 13, 1971

OPINION LETTER NO. 441
Answer by letter-Mansur

Mr. Herbert M. Kohn
County Counselor
Jackson County Courthouse
Suite 202
Kansas City, Missouri 64106



Dear Mr. Kohn:

This is in response to your request for an opinion from this office as follows:

"Does a legal protest filed with the Board of Zoning Adjustment require a favorable vote of all of the members of the Board of Zoning Adjustment?"

"Section 64.271 makes such a requirement as to the County Court. Does this section apply to the Board of Zoning Adjustment also? Section 64.281 pertains to the Board of Zoning Adjustment."

The statutes governing county planning and zoning in noncharter class one counties is found in Sections 64.211 to 64.295, RSMo 1969.

Section 64.215, RSMo 1969, provides the county planning commission shall consist of one of the judges of the county court, the county highway engineer, the chairman of the planning bodies of Independence and Kansas City, and six residents of the unincorporated territory of the county to be appointed by the county court.

Section 64.281, RSMo 1969, to which you refer, provides that any county which has appointed a county planning commission shall create by order a county board of zoning adjustment which board

Mr. Herbert M. Kohn

shall consist of the three judges of the county court with authority to hear and decide appeals regarding the enforcement of county zoning regulations.

On passing on the matters presented on appeal under Section 64.281, supra, the county zoning board members are not acting in their official capacity as members of the county court but are acting as members of an independent board created by statute as the county board of zoning adjustment.

You inquire whether the county board of zoning adjustment when transacting business under Section 64.281 requires a favorable vote of all members of the board as is required by members of the county court under Section 64.271.

It is our opinion that it does not for two reasons: First, because the statutory provision which requires a favorable vote of all members of the county court applies only to proceedings under Section 64.271. Second, because the county board of zoning adjustment established under Section 64.281 is an independent board created by statute, separate and distinct, from the county court although said board is composed of the members of the county court.

Section 1.050, RSMo 1969, provides:

"Words importing joint authority to three or more persons shall be construed as authority to a majority of the persons, unless otherwise declared in the law giving the authority."

Since there is no provision to the contrary in Section 64.281, the provisions of Section 1.050 are applicable; and there is, therefore, no requirement that action taken by the county board of zoning adjustment must be by unanimous vote.

It is therefore the opinion of this office that there is no requirement that action taken by a county board of zoning and adjustment created under Section 64.281, RSMo, must be by unanimous vote.

Yours very truly,

JOHN C. DANFORTH
Attorney General

LIQUOR:
SUNDAY SALES OF PACKAGED
LIQUOR BY RESTAURANT BARS:

A license for a "restaurant bar" to
sell intoxicating liquor by the drink
for consumption on the premises under
Section 311.097, S.C.S.S.B. No. 148

of the 76th General Assembly, includes the right to sell intoxicating
liquor in the original package.

OPINION NO. 442

November 24, 1971

Colonel William Wright
Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Colonel Wright:

This is in response to your request for our opinion concerning
the sale of intoxicating liquor in the original package between the
hours of 1:00 p.m. and midnight on Sunday by "restaurant bars" hold-
ing a license to sell intoxicating liquor by the drink at retail for
consumption on the premises.

Specifically, you have asked if a "restaurant bar" licensed
under Section 311.097, S.C.S.S.B. No. 148 of the 76th General Assembly
can sell intoxicating liquor in the original package between the hours
of 1:00 and midnight on Sunday.

It is our opinion that a "restaurant bar" licensed under Sec-
tion 311.097 may legally sell intoxicating liquor in the original
package between the hours of 1:00 p.m. and midnight on Sunday.

Section 311.097, S.C.S.S.B. No. 148 of the 76th General Assembly
provides:

"1. Notwithstanding any other provisions of
this chapter to the contrary, any person who
possesses the qualifications required by this
chapter, and who now or hereafter meets the
requirements of and complies with the pro-
visions of this chapter, may apply for, and
the supervisor of liquor control may issue, a
license to sell intoxicating liquor, as in this
chapter defined, between the hours of 1:00 p.m.
and midnight on Sunday by the drink at retail

for consumption on the premises of any restaurant bar as described in the application. As used in this section the term 'restaurant bar' means any establishment having a restaurant or similar facility on the premises at least fifty percent of the gross income of which is derived from the sale of prepared meals or food consumed on such premises.

"2. The bond requirements of section 311.090, the authority for the collection of fees by cities and counties as provided in section 311.220, and all other laws and regulations of the state relating to the sale of liquor by the drink for consumption on the premises where sold shall apply to a restaurant bar in the same manner as they apply to establishments licensed under sections 311.085, 311.090 and 311.095 and in addition to all other fees required by law a restaurant bar shall pay an additional fee of two hundred dollars a year payable at the same time and in the same manner as its other license fees." (Emphasis added)

Section 311.200(4), RSMo 1969 provides:

"For every license issued for the sale of all kinds of intoxicating liquor, at retail by the drink for consumption on premises of the licensee, the licensee shall pay to the director of revenue the sum of three hundred dollars per year, which shall include the sale of intoxicating liquor in the original package." (Emphasis added)

All establishments licensed under Sections 311.085, 311.090 or 311.095, RSMo 1969, hold licenses to sell intoxicating liquor at retail for consumption on the premises which also includes the right to sell intoxicating liquor in the original package, under Section 311.200(4). Since subsection 2 of Section 311.097 directs that all other laws and regulations of the state relating to the sale of liquor by the drink for consumption on the premises shall apply to a "restaurant bar" in the same manner as they apply to establishments licensed under Sections 311.085, 311.090 and 311.095, and since Section 311.200(4) is such a law authorizing a holder of a license under Sections 311.085, 311.090 or 311.095 also to sell intoxicating liquor in the original package, a "restaurant bar" licensed under Section 311.097 has the right to sell intoxicating liquor in the original package for the reason that Section 311.200(4) is applied to a "restaurant bar" in the same manner as it is applied to an establishment licensed under Sections 311.085, 311.090 or 311.095.

Colonel William Wright

CONCLUSION

It is the opinion of this office that intoxicating liquor in the original package may be sold by "restaurant bars" licensed under Section 311.097, S.C.S.S.B. No. 148 of the 76th General Assembly, between the hours of 1:00 p.m. and midnight on Sunday.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard S. Paden.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

November 16, 1971

OPINION LETTER NO. 444
Answer by letter-Wieler

Mr. James E. Schaffner, Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in response to your request for an opinion as to the force and effect of Section 302.307, recently enacted by the Missouri legislature (House Bill No. 264, 76th General Assembly). Section 302.307 provides:

"302.307. 1. Any other provision of law notwithstanding, any person who has, within sixty days before the date upon which he submits himself to be examined for a license to operate a motor vehicle, been released from active duty on honorable conditions in any of the armed forces of the United States, with two years of active service, and who, when so released, did not possess a license to operate a motor vehicle in this state because his license was then suspended because of point accumulation, may take the examination prescribed by this chapter even though his original license is suspended. He shall apply for and be examined in the same manner as any person first applies for a license in this state.

"2. Upon the successful completion of the examination the director shall issue a new license to the applicant and all accumulated points against the applicant shall be immediately removed so that his record will stand as if he was at this time being first licensed in this state."

Mr. James E. Schaffner

Your first question asks whether the provisions of Section 302.307 apply to those cases in which the driver's license of a discharged serviceman or servicewoman has been revoked rather than suspended because of point accumulation. In our view, it does not. The terms "revocation" and "suspension" have a definite meaning as used in the point accumulation system contained in the Driver's License Chapter. Section 302.304(2) provides for suspension of operating privileges when eight points have been accumulated in eighteen months for a period of not less than thirty nor more than ninety days, whereas Section 302.304(3) provides for revocation where twelve points have been accumulated in twelve months or eighteen points in twenty-four months or twenty-four points in thirty-six months. Section 302.309, sub. 1, provides for return of a suspended license to the operator or chauffeur immediately upon the termination of the period of suspension and upon compliance with the requirements of Chapter 303, RSMo, whereas Section 302.309, sub. 2, requires application for a new license in the manner prescribed by law on the part of one whose license has been revoked under the point accumulation system. Section 302.190 provides that application for a new license after revocation shall not be granted in any event until the expiration of one year after the date of revocation. Inasmuch as these terms have a special and distinct meaning within the context of the Driver's License Act, the provisions of Section 302.307 cannot be applied to those cases in which the driver's license of a discharged serviceman or servicewoman has been revoked because of point accumulation where such term is not used within the section.

In your second question, you ask whether the provisions of Section 302.307 apply to those cases in which the driver's license of a serviceman or servicewoman has been suspended under the provisions of Chapter 303, RSMo (Safety Responsibility Law), because of an accident, or a court judgment in an accident case. In our view, it does not. Section 302.307, sub. 1, specifically provides that the suspension must be as the result of point accumulation. This can only be as the result of point accumulation under the point system contained in Chapter 302, RSMo.

In your third question, you ask whether a person must be under suspension at the time of his release from two years active duty in the military service in order to be eligible for the examination and license under the provisions of Section 302.307. The answer to this question is yes. Section 302.307 specifically states that a serviceman is eligible for a driver's examination and license under the provisions of Section 302.307 when at the time of his release from the armed forces he did not possess a license to operate a motor vehicle in this state because his license was then suspended because of point accumulation. By its very terms, Section 302.307 would not apply to suspension for point accumulation to a serviceman still on active military duty, or to an ex-serviceman whose driving privilege was suspended subsequent to his release from active duty.

Mr. James E. Schaffner

Your last question deals with the constitutionality of Section 302.307. In the absence of obvious constitutional infirmities, the question of the constitutionality of a statute cannot be answered in the negative by this office. An act of the legislature carries a presumption of constitutionality. *Borden Company v. Thomason*, 353 S.W.2d 735, 743 (Mo. banc 1962).

Yours very truly,

JOHN C. DANFORTH
Attorney General

November 17, 1971

OPINION LETTER NO. 445
Answer by Letter - C. B. Blackmar



Honorable Robert A. Young
Missouri Senate, District 24
3500 Adie Road
St. Ann, Missouri 63074

Dear Senator Young:

This letter is issued in reply to your opinion request in which you ask the following question:

"Can the City of Bridgeton, a constitutional charter city in St. Louis County, legally enact, by the initiative process, [an] ordinance . . . which ordinance would prohibit the construction of any levee higher than 446 feet above sea level? If the ordinance would not be valid, may the City Council refuse to call an election on the proposed ordinance?"

We first turn to your second inquiry in which you ask whether a city council or equivalent agency is required to submit to the voters an ordinance proposed by initiative petition if it is of the opinion that the ordinance could not be validly enacted. If the council declines to submit the ordinance at an election the proponents may seek mandamus in a court of appropriate jurisdiction. If the ordinance could not validly be enacted the court will refuse mandamus. If it could be so enacted then the council or other agency will be ordered to submit it to the voters. These principles are established in numerous cases including State ex rel. Sessions v. Bartle, 359 S.W.2d 716 (Mo. 1962) and State ex rel. Powers v. Donohue, 368 S.W.2d 432 (Mo. 1963).

Honorable Robert A. Young

We have been furnished with opinions of the city attorney and of special counsel for the City of Bridgeton to the effect that the proposed ordinance would not be a valid enactment. Special counsel considers that the ordinance is a zoning ordinance and concludes that both the city charter and state law forbid the proposal of zoning acts by the initiative.

Both opinions also raise the question of the constitutional validity of the proposed limitation of the maximum elevation of levees under Article I, Section 10 (precluding the taking of property without due process of law) and Article I, Section 26 (forbidding the taking of private property for public use without just compensation) of the Missouri Constitution. It is argued that the effect of the ordinance would be to prevent a property owner from building a barrier to surface water.

These opinions appear to be carefully considered. The issues present complicated questions of both law and fact which can be referred to a court which will reach a decision on the consideration of evidence and the applicable law.

Very truly yours,

JOHN C. DANFORTH
Attorney General

JURORS:
SUMMONS:

A sheriff may serve jury summons by mail under the provisions of Section 494.225, RSMo, (S.C.S.S.B. No. 103 of the 76th General Assembly) effective September 28, 1971, without regard to the method used for assembling and drawing names of jurors.

OPINION NO. 450

November 10, 1971

Honorable John D. Schneider
Missouri Senate, District 14
1185 Penhurst
St. Louis, Missouri 63033



Dear Senator Schneider:

This official opinion is issued pursuant to your recent request in which you ask whether a sheriff may serve a summons for jury duty by mail in a case in which the selection of jurors has been accomplished without the assistance of a data processing system.

Senate Committee Substitute for Senate Bill No. 103 of the 76th General Assembly effective September 28, 1971, is entitled "AN ACT relating to juries" and reads as follows:

"SECTION 1. Chapter 494, RSMo, is amended by adding one new section to be known as Section 494.225, to read as follows:

494.225

Any other provisions of Chapters 494, 495, 496, 497, 498 and 499 notwithstanding, the board of jury commissioners, or jury commission board, or board of jury supervisors or jury commissioner as the case may be may cause to be maintained the list of names and addresses of qualified jurors as required by law by storing them upon magnetic tape, cores, discs, or similar devices which are a part of a data processing system and may cause general panels of jurors to be drawn therefrom by designating a suitable method of random selection so that the names drawn for any general panel of jurors shall be thoroughly mixed; and, summons for jury duty shall be served by the sheriff and the sheriff may use the United States mail to accomplish service. Actual receipt of summons

Honorable John D. Schneider

by mail by the person summoned for jury duty or by some member of his family over the age of fifteen years shall be lawful service."

We note that the new Section 494.225 applies by its express terms to each of six statutory chapters dealing with juries, and that its provisions prevail "any other provisions" of these chapters to the contrary "notwithstanding."

The first sentence of Section 494.225 consists of two independent clauses separated by a semicolon. The first relates to the method of securing and drawing the names of jurors and is addressed to the "board of jury commissioners" or other agency responsible for the selection of jurors. Its purpose is to permit the use of electronic data processing systems in maintaining lists of jurors and drawing particular names.

The second independent clause is addressed to the several sheriffs, and relates solely to the method of serving summons on the persons whose names have been drawn.

The evident purpose of the legislation is to permit two modifications in the methods theretofore prevailing in the process of obtaining jurors. Each independent clause should be given full effect in accordance with its terms. There is no logical relationship between the method by which the names of jurors are drawn, and the method for serving summons on jurors. The second independent clause of Section 494.225 is not dependent on nor limited by the first clause.

This conclusion is reinforced by the second full sentence of Section 494.225, which deals solely with summons and not at all with the drawing of names for juries.

S.C.S.S.B. No. 103 deals with a single subject--"juries"--which is clearly expressed in its title as required by Article III, Section 23 of the Missouri Constitution. There is no reason why the legislature could not give separate directions to different officials in two independent clauses in the same sentence.

CONCLUSION

It is the opinion of this office that a sheriff may serve jury summons by mail under the provisions of Section 494.225, RSMo, (S.C. S.S.B. No. 103 of the 76th General Assembly) effective September 28, 1971, without regard to the method used for assembling and drawing names of jurors.

Honorable John D. Schneider

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

December 9, 1971

OPINION LETTER NO. 455
Answer by letter-C.A. Blackmar



Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
P. O. Box 716
Jefferson City, Missouri 65101

Dear Mr. Pemberton:

This is in response to your request for an opinion on the question of whether the articles of agreement of a proposed new bank, which has filed its articles of agreement with the Commissioner of Finance but has not been granted a certificate of incorporation, may amend its articles of agreement by following the procedure set out in Section 362.325, RSMo 1969. Section 362.325, RSMo, provides:

"Any bank or trust company may, at any time,
. . . change its articles of agreement . . .
with the consent of the persons holding a
majority of the stock of the bank or trust
company, which consent shall be obtained at
an annual meeting or at a special meeting of
the shareholders called for that purpose."

The section then goes on to describe the mechanics by which an amendment is adopted by a vote of the shareholders.

We are of the opinion that that section is not applicable to a proposed bank not yet in existence by virtue of the definition of the word "bank" contained in Section 362.010, RSMo 1969, which applies under the provisions of Section 362.010, RSMo, to the term "bank" as it is used in Section 362.325, RSMo. The definition for the word "bank" is as follows:

Mr. H. Duane Pemberton

"'Bank' means any corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether the deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing;"

Inasmuch as a proposed bank which has not been granted a certificate of incorporation by the Commissioner of Finance may not solicit, receive, or accept money or its equivalent on deposit, the word "bank" in Section 362.325, RSMo, has no application to a proposed bank.

It is the opinion of this office that if the organizers of a proposed bank wish to amend the articles of agreement, the proper procedure is for the organizers to withdraw the articles of agreement filed with the Commissioner of Finance and then to submit to him new articles of agreement signed by each person who is to be an incorporator of the proposed bank under the new articles which are submitted.

Yours very truly,

JOHN C. DANFORTH
Attorney General

December 17, 1971

OPINION LETTER NO. 456
Answer by letter-Cole

Mr. H. Duane Pemberton
Commissioner of Finance
Post Office Box 716
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to your letter requesting an opinion from this office on a question which we understand to be as follows:

"What finance charge can be levied on the credit sales of mobile homes, trucks, or automobiles that have a cash sale price in excess of \$7,500.00?"

You are correct in assuming that Missouri's Motor Vehicle Time Sales Law is inapplicable to new mobile homes, trucks or automobiles having a cash sale price in excess of \$7,500.00. The act only affects sales of "motor vehicles" as defined in Section 365.020, RSMo 1969:

"(5) 'Motor vehicle', any new or used automobile, mobile home, motorcycle, truck, trailer, semitrailer, truck tractor, or bus having a cash sale price of seven thousand five hundred dollars or less primarily designed or used to transport persons or property on a public highway, road or street;" (emphasis added)

Similarly, the subject matter of transactions covered by Missouri's Retail Credit Sales Act is limited to "goods" (specifically excluding mobile homes, trucks, or automobiles), having a cash sale price of \$7,500.00 or less. Section 408.250, RSMo 1969.

The only remaining statutes that could regulate credit sales of new mobile homes, trucks, or automobiles costing over \$7,500.00 are the Missouri usury statutes, Sections 408.020-070, RSMo 1969, which provide that a loan with an agreed upon interest rate exceeding eight percent per annum is usurious, Section 408.030, RSMo 1969, and that interest paid above this amount is recoverable with costs and attorneys fees. Section 408.050, RSMo 1969.

The Missouri courts have held that if a transaction is not a lending of money but is a bona fide sale of merchandise on credit the transaction is not within the scope of the usury statutes. This view has been expressed by the Kansas City Court of Appeals in *Wyatt v. Commercial Credit Corporation*, 341 S.W.2d 348 (Mo. 1960) and by the Springfield Court of Appeals in *Securities Investment Company v. Hicks*, 444 S.W.2d 6 (Mo. 1969) and *General Contract Purchase Corporation v. Propst*, 239 S.W.2d 563 (Mo. 1951). Whether the transaction is a bona fide credit sale is, of course, a question of facts to be determined from the circumstances of each case. However, the Kansas City Court of Appeals has set down the following guidelines to aid in determining the real nature of the transaction:

"It is true, a loan may be cloaked in the outward form and appearance of a purchase, in which case that will not change the substance of the transaction nor hide the usury. But if there is a real and bona fide purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate for the hire of money and not of anything else; and a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller. So that a sale in good faith of property, merchandise, or of an indorsement, or guaranty, or even of credit, if the seller has no other interest in the transaction, is valid and not open to the objection of usury whatever the price. (Citations). And if the sale be a real and not a pretended transaction, it will not make any difference even though the seller have a cash price and a larger price where the

sale is on time or credit. If the buyer chooses to purchase on time and pay the larger price, the taking of a note for the latter will not constitute usury."

General Motors Acceptance Corp. v. Weinrich, 262 S.W. 425, 428 (Mo. 1924), quoted in Wyatt v. Commercial Credit Corporation, supra, at 352.

In summary, it is our view that neither Missouri's Motor Vehicle Time Sales Law or Retail Credit Sales Act applies to the sale of new mobile homes, trucks, or automobiles having a cash sale price in excess of \$7,500.00. Furthermore, the Missouri usury statutes apply only to loans of money. Consequently, as concerns an above mentioned vehicle, costing over \$7,500.00, Missouri does not limit the finance charges on a retail installment contract, time payment plan or similar commercial credit transaction, unless the whole transaction is, in fact, "a mere pretense and a sham in order to camouflage the real facts." General Contract Purchase Corporation v. Propst, supra, at 567.

Very truly yours,

JOHN C. DANFORTH
Attorney General

December 17, 1971

OPINION LETTER NO. 457
Answer by letter-C.A. Blackmar

Mr. H. Duane Pemberton
Commissioner of Finance
Division of Finance
P. O. Box 716
Jefferson City, Missouri 65101



Dear Mr. Pemberton:

This is in response to your request for an opinion on the following question:

"What is the maximum rate of interest that can be charged on insurance premium financing?"

We understand that your opinion request concerns only loans to individuals (not corporations) and does not concern creditor insurance required by lenders making other types of loans.

We assume also that you are not inquiring as to "pawnbroker loans" made under the provisions of Sections 367.011 to 367.060, RSMo 1969.

After a review of the laws concerned with retail credit charges, Sections 408.250 through 408.370, RSMo 1969, we are of the opinion that those sections have no application to your opinion request. We find no other law of this state which specifically deals with the rate of interest on loans to finance insurance premiums.

Therefore, the answer to your question is found in the general laws of this state dealing with interest. Those laws are Sections 408.020, 408.030, and 408.100 through 408.220, RSMo 1969.

Section 408.020 provides:

"Creditors shall be allowed to receive interest at the rate of six percent per annum, when no

Mr. H. Duane Pemberton

other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made."

Thus, in those situations when interest is permitted to be charged by that section and there is no agreement as to the rate of interest, the rate is six percent. However, in Section 408.030 it is stated:

"The parties may agree, in writing, for the payment of interest, not exceeding eight percent per annum, on money due or to become due upon any contract."

If the parties agree, that section would be applicable to insurance premium financing.

If a loan is made to finance insurance premiums in accordance with the provisions of Sections 408.100 through 408.220, the maximum rate on the first five hundred dollars at the agreement of the parties is set forth in Section 408.100(1) and (2). There it is provided:

"(1) Which will yield fifteen dollars for one hundred dollars of principal which is to be repaid in twelve equal and consecutive monthly installments of principal and interest combined; and

"(2) Which shall not exceed 2.218% per month on the unpaid principal balance."

If a loan is made in accordance with the provisions of Sections 408.100 through 408.220 and exceeds five hundred dollars, the rate of interest that may be charged is set forth in Section 408.200, RSMo 1969. That section provides:

"No lender shall permit any borrower to be indebted to such lender on two or more contracts at any time for the purpose or with the result of contracting for or receiving the interest permitted by section 408.100 on more than five hundred dollars of principal (excluding interest). It shall be lawful for a lender to lend

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at the same or different times to the same borrower five hundred dollars or less under and at the rates permitted by section 408.100 and additional amounts at not more than eight percent per annum even though such additional amounts brings the aggregate amount outstanding to an amount in excess of five hundred dollars and whether such loan or loans be evidenced by one or more than one note or loan contract. When such aggregate principal amount outstanding exceeds five hundred dollars and is evidenced by one note or loan contract, it shall be treated as one loan and interest may be computed at the rates permitted under section 408.100 on that part of the unpaid principal balance of the total indebtedness not exceeding five hundred dollars and at no more than eight percent per annum on any remainder of such unpaid principal balance and the provisions of sections 408.120, 408.130 and 408.160 to 408.180 shall apply to the full amount of the note or loan contract."

It is the opinion of this office that the maximum rate of interest on loans to individuals for insurance premium financing is regulated by Sections 408.020, 408.030 and 408.100 through 408.220, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

December 7, 1971

OPINION LETTER NO. 458
Answer by Letter - Klaffenbach



Mr. Joseph Jaeger, Jr., Director
Missouri State Park Board
Post Office Box 176
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

This letter is in answer to your opinion request in which you ask the following question:

"Is the State Park Board required by statute to insert in its park concession contracts a provision that if the net profits of the contractor for any one year exceed the sum of \$17,500, such excess shall be paid over to the State?"

You add that:

"Park Concession contracts, authorized by Section 253.080, RSMo, normally provide for specified percentages of the contractor's gross receipts in various categories of the concession to be remitted to the State. Further provision is made that if the contractor's net profits for one calendar year exceed the sum of \$17,500, 100% of such excess shall be returned to the State. The Park Board has considered removing the \$17,500 limitation in these contracts but is unsure whether it has the discretion to do so."

Section 253.080, RSMo 1969, with respect to such contracts provides:

Mr. Joseph Jaeger, Jr.

"1. The park board may construct, establish and operate suitable public services, privileges, conveniences and facilities on any land, site or object under its jurisdiction and control, and may charge and collect reasonable fees for the use of the same. The park board may charge reasonable fees for supplying services on state park areas. Any facilities so constructed under this provision shall only be done by appropriated funds.

"2. The park board may award by contract to any suitable person, persons, corporation or association the right to construct, establish and operate public services, privileges, conveniences and facilities on any land, site or object under its control for a period not to exceed twenty-five years with a renewal option, and may supervise and regulate any and all charges and fees of operations by private enterprise for supplying services and operating facilities on state park areas.

"3. All contracts awarded under this section shall be entered into upon the basis of competitive sealed bids. A sworn financial statement shall accompany each bid, and all contracts shall be let by the board at a regular meeting after public notice of the time of the letting. All bids submitted prior to the opening of the meeting shall be considered. Advertisements for bids in daily or weekly newspapers shall be made by the board. The board shall accept the bid most favorable to the state from a responsible and reputable person but may, for good cause, reject any bid.

"4. No contract for a period of ten years or more or a renewal thereof for such period, as provided in subsection 2, shall be finally awarded until approved by the general assembly by concurrent resolution considered and adopted as other concurrent resolutions of the general assembly.

"5. A good and sufficient bond conditioned upon the faithful performance of the contract and compliance with this law shall be required of all contractors.

Mr. Joseph Jaeger, Jr.

"6. Any person who contracts under this section, except under subsection 2, with the state shall keep true and accurate records of his receipts and disbursements arising out of the performance of the contract and shall permit the board and the state collector of revenue to audit them. The board and the collector of revenue shall audit the receipts and disbursement of each contract once very two years and upon the expiration of the contract. If, upon audit, it appears that the net profits of the contractor for any one year have exceeded the sum of seventeen thousand five hundred dollars, the excess shall be paid over to the state collector of revenue and may be recovered from the contractor and his sureties. For the purpose of subsections 5 and 6, no contract shall be deemed to extend to operations or management in more than one state park."
(Emphasis added)

It is clear that the portion of the legislation which we have underscored in subsection 6 "except under subsection 2," appears to nullify the requirement in question. However subsection 6 literally pertains to "[a]ny person who contracts under this section," i.e., Section 253.080, and subsection 2 constitutes the authority for such contracts. Therefore, applying the exception literally would contravene the basic rules of statutory construction that we must ascertain and give effect to the legislative intent, Turner v. Kansas City, 191 S.W.2d 612 (Mo. 1945) and avoid a construction which would convict the legislature of doing a useless and reasonless thing. Hawkins v. Smith, 147 S.W. 1042 (Mo. 1912). The letter of the statute must give way somewhat to its obvious intentment. Rutter v. Carothers, 122 S.W. 1056 (Mo. 1909).

Similar provisions with respect to audits and to maximum profits were contained in the Laws of 1961, p. 235. That is, Section 253.080 subsection 4, previously provided in part:

" . . . If, upon audit, it appears that the net profits of the contractor under a contract the term of which is two years or less, for any one year have exceeded the sum of ten thousand dollars, the excess shall be paid over to the state collector of revenue and may be recovered from the contractors and his sureties. . . ."
(Emphasis added)

The present provision omitted that which is underscored above and changed the amount relating to the profit limitation. Previous

Mr. Joseph Jaeger, Jr.

law must be considered in our interpretation of existing law, City of St. Louis v. Williams, 139 S.W. 340 (Mo. 1911), and thus, the conclusion that we reach is that the present \$17,500 limitation applies to such park concession contracts.

Under these circumstances, the Park Board has the authority and the duty to include the \$17,500 limitation in all contracts awarded under Section 253.080 until otherwise directed by the legislature by amendment to such section.

Very truly yours,

JOHN C. DANFORTH
Attorney General

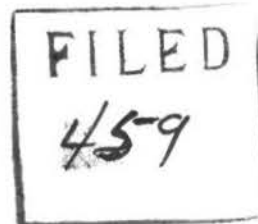
TAXATION (INCOME):
TAX SHELTERED ANNUITY:

One may deduct from his gross income reportable for Missouri income tax purposes an amount used to purchase a "tax sheltered annuity" pursuant to a deferred compensation agreement with the employer so long as that deduction is not in excess of the amount properly includable in the gross income of the employee pursuant to the provisions of the Internal Revenue Code of the United States.

OPINION NO. 459

December 29, 1971

Honorable Joseph W. Beckerle
Representative, District 61
6145 South Grand
St. Louis, Missouri 63111



Dear Representative Beckerle:

This opinion is in response to your question of whether an employee of the St. Louis Board of Education may deduct from his gross income reportable for Missouri income tax purposes an amount used to purchase a "tax sheltered annuity," pursuant to a deferred compensation agreement with the employer.

Earlier this year the 76th General Assembly enacted Senate Bill No. 270 (Section 143.100, RSMo). That section, in defining "income" states, in subsection 7:

"The amount to be included in the gross income of an employee attributable to contributions by or cost to his employer for group term life insurance, accident and health plans and pensions or profit-sharing plans on his behalf, or attributable to amounts received by an employee under such accident and health plans, or attributable to any agreement with his employer for a salary adjustment in return for a deferred compensation arrangement between the employer and the employee, shall be the same as, and not in excess of, the amount properly includable in the gross income of the employee pursuant to the provisions of the Internal Revenue Code of the United States."
(Emphasis added)

You enclosed forms that purport to authorize a salary reduction for employees in order to purchase a tax sheltered variable annuity as authorized by Section 403(B) of the Internal Revenue Code.

Honorable Joseph W. Beckerle

To qualify as a deduction under this section, the following elements must be present: (1) a deferred compensation agreement must be executed between employer and employee; (2) the compensation deferred must be used to purchase an annuity that qualifies for an income tax deduction under the Federal Internal Revenue Code.

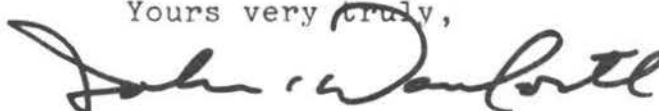
The foregoing are only general standards for the application of this new statute, Senate Bill No. 270. Determinations of the qualification of specific programs for deduction must be made on a case by case basis. Strict compliance with the terms of the statute will be necessary to qualify a deferred compensation program for the deduction provided by Senate Bill No. 270. It is a well established principle of the law of taxation that a deduction will be allowed only where clearly provided for by statute. Since such deductions represent statutory grants, general equitable considerations are irrelevant. E.g. State v. L. & A. Contracting Company, 133 So.2d 546 (Miss. 1961); 85 C.J.S., Taxation, Section 1099.

CONCLUSION

It is therefore the opinion of this office that one may deduct from his gross income reportable for Missouri income tax purposes an amount used to purchase a "tax sheltered annuity" pursuant to a deferred compensation agreement with the employer so long as that deduction is not in excess of the amount properly includable in the gross income of the employee pursuant to the provisions of the Internal Revenue Code of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Peter H. Ruger.

Yours very truly,



JOHN C. DANFORTH
Attorney General

COUNTY COURT:

COUNTIES:

COUNTY COLLECTOR:

BONDS:

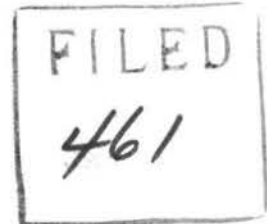
1. The county court in a third or fourth class county is not required to pay any of the cost of the surety bond for the county collectors. 2. The whole cost of such surety bond

must be paid by the county where, (1) the county collector elects to enter into a surety bond with a surety company authorized to do business in the state, and (2) the county court has given its consent to be liable and approves the bond. 3. The county court may not participate in a partial payment of the cost of the surety bond for the county collector.

OPINION NO. 461

December 20, 1971

Honorable J. F. Patterson
Missouri Senate, 25th District
112 West 18th Street
Caruthersville, Missouri 63830



Dear Senator Patterson:

This is in response to your request for our opinion concerning the payment of the cost of a county collector's surety bond by the county court in a third or fourth class county. Specifically you have asked:

"1. Is the county court of a third or fourth class county required to pay a portion of the cost of surety bond for the county collector?"

"2. Is the county court prohibited by law from paying a portion or all of the cost of bond for the county collector?"

"3. If the law is not clear on this matter, does the county court have an option to participate partly or in whole in the payment of the bond for the county collector?"

Every collector of the revenue in third and fourth class counties of this state, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, such bond being conditional on his faithful and punctual performance of all the duties of the office of collector according to law. See Section 52.020, RSMo 1969.

Honorable J. F. Patterson

Section 107.070 clearly states that this county officer may elect, with the consent and approval of the governing body of the county, which is the county court, to enter into a surety bond with an authorized surety company and then the cost of every such surety bond shall be paid by the public body protected thereby. The relevant language of Section 107.070, RSMo 1969 is as follows:

"Whenever any . . . officer of any county of this state . . . shall be required by law of this state . . . to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such . . . county . . . to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

In Berry v. Linn County, 355 Mo. 191, 195 S.W.2d 502 (1946), the court held that the purpose of this section as it applies to counties, is that the cost of the surety company bond given by a county officer shall not be imposed on the county unless the county agrees. See also Boatright v. Saline County, 350 Mo. 945, 169 S.W.2d 371 (1943).

This section discloses the legislative intent that the county should be liable for the premium only where the county court consents to such liability and approves the bond. Cox v. Polk County, 173 S.W.2d 680 (Mo. 1943); Motley v. Callaway County, 347 Mo. 1018, 149 S.W.2d 875 (1941).

It is the opinion of this office that a county court in a third or fourth class county is not required to pay all or any portion of the cost of the surety bond for the county collector. However, the whole cost of this surety bond or bonds must be paid by the public body protected thereby where, (1) the county collector elects to enter into a surety bond or bonds with a surety company or surety companies authorized to do business in the state of Missouri, and (2) the county court consents to such liability and approves the bond. Section 107.070, RSMo 1969; Berry v. Linn County, *supra*; Cox v. Polk County, *supra*; Motley v. Callaway County, *supra*; opinion of the Attorney General, No. 245, Blanck, 8-5-65; opinion of the Attorney General, No. 75, Rice, 8-21-61; opinion of the Attorney General, No. 18, Collins, 4-16-56.

The question now becomes, "Does the county court have an option to participate in the partial payment of the cost of the surety bond for the county collector?"

Honorable J. F. Patterson

It is the opinion of this office that the county court may not participate in the partial payment of the cost of the surety bond for the county collector.

This controlling statute, Section 107.070, RSMo 1969, expressly grants the power to the county court to give its consent and approval or the power to withhold its consent and approval. The result is that the people protected by the bond will be liable for the whole cost if the court's consent and approval is given, or the county will incur no liability if the court's consent and approval is withheld. There is no expressed provision authorizing the county court to participate in partial payment of the cost of this surety bond. It was well settled by Lancaster v. The County of Atchison, 352 Mo. 1039, 180 S.W.2d 706, 708 (banc 1944) that counties:

"...can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S.W.2d 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 74 S.W.2d 367, 372."

The court in Lancaster on page 709 went on to state:

"... Where the statute ... 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' Keane v. Strodtman, 323 Mo. 161, 18 S.W.2d 896, 898. See, also, Dougherty v. Excelsior Springs, 110 Mo.App. 623, 85 S.W. 112; Taylor v. Dimmitt, 326 Mo. 330, 78 S.W.2d 841, 98 A.L.R. 995. In other words, there can never be an implied power given a county or other public corporation when there is an express power."

CONCLUSION

It is the opinion of this office that:

Honorable J. F. Patterson

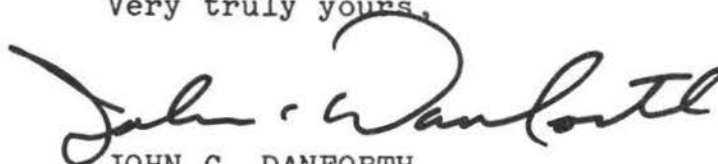
1. The county court in a third or fourth class county is not required to pay any of the cost of the surety bond for the county collector.

2. The whole cost of such surety bond must be paid by the county where, (1) the county collector elects to enter into a surety bond with a surety company authorized to do business in the state, and (2) the county court has given its consent to be liable and approves the bond.

3. The county court may not participate in a partial payment of the cost of the surety bond for the county collector.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard S. Paden.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 245
8-5-65, Blanck

Op. No. 75
8-21-61, Rice

Op. No. 18
4-16-56, Collins

CONSTITUTIONAL LAW:

Article XII, Section 3(a), (b) and
(c) of the Missouri Constitution
provides no method by which a constitutional convention may be
limited in its consideration of proposed amendments.

OPINION NO. 464

December 20, 1971

Honorable J. Anthony Dill
Representative, District 44
8011 Grandvista Avenue
St. Louis, Missouri 63123



Dear Representative Dill:

This is in reply to your request for an opinion of this office concerning Article XII of the Constitution of the State of Missouri your specific question being:

"Is it possible under Article 12 of the constitution of the State of Missouri to convene a limited State Constitutional Convention for the purpose of amending a specific Article or several specific Articles of the state constitution?"

Our research leads us to conclude that your question must be answered negatively. By reference to Article XII, Constitution of Missouri, it can be seen that there are three different procedures available for revising the Constitution of Missouri. These methods are: (1) submission of a proposed Constitution or amendments to the people by a constitutional convention; (2) proposal of amendments by a joint resolution of the General Assembly, and (3) proposal of amendments by citizen petition. Your particular question is ruled by Article XII, Section 3(a), (b) and (c). See also Sections 125.050 and 125.090, RSMo 1969.

The relevant constitutional sections provide:

"At the general election on the first Tuesday following the first Monday in November 1962, and every twenty years thereafter, the secretary of state shall, and at any general or special election the general assembly by law may, submit to the electors of the state the question 'Shall there be a convention to revise and amend the Constitution?'. The question shall be submitted on a separate ballot without party designation, and if a majority

Honorable J. Anthony Dill

of the votes cast thereon is for the affirmative, the governor shall call an election of delegates to the convention on a day not less than three nor more than six months after the election on the question. At the election the electors of the state shall elect fifteen delegates-at-large and the electors of each state senatorial district shall elect two delegates. Each delegate shall possess the qualifications of a senator; and no person holding any other office of trust or profit (officers of the organized militia, school directors, justices of the peace and notaries public excepted) shall be eligible to be elected a delegate. To secure representation from different political parties in each senatorial district, in the manner prescribed by the senatorial district committee each political party shall nominate but one candidate for delegate from each senatorial district, the certificate of nomination shall be filed in the office of the secretary of state at least thirty days before the election, each candidate shall be voted for on a separate ballot bearing the party designation, each elector shall vote for but one of the candidates, and the two candidates receiving the highest number of votes in each senatorial district shall be elected. Candidates for delegates-at-large shall be nominated by nominating petitions only, which shall be signed by electors of the state equal to five per cent of the legal voters in the senatorial district in which the candidate resides until otherwise provided by law, and shall be verified as provided by law for initiative petitions, and filed in the office of the secretary of state at least thirty days before the election. All such candidates shall be voted for on a separate ballot without party designation, and the fifteen receiving the highest number of votes shall be elected. Not less than fifteen days before the election, the secretary of state shall certify to the county clerk of the county the name of each person nominated for the office of delegate from the senatorial district in which the county, or any part of it, is included, and the names of all persons nominated for delegates-at-large." (Section 3(a))

Honorable J. Anthony Dill

"The delegates so elected shall be convened at the seat of government by proclamation of the governor within six months after their election. The facilities of the legislative chambers and legislative quarters shall be made available for the convention and the delegates. Upon convening all delegates shall take an oath or affirmation to support the Constitution of the United States and of the state of Missouri, and to discharge faithfully their duties as delegates to the convention, and shall receive for their services the sum of ten dollars per diem and mileage as provided by law for members of the general assembly. A majority of the delegates shall constitute a quorum for the transaction of business, and no Constitution or amendment to this Constitution shall be submitted to the electors for approval or rejection unless by the assent of a majority of all the delegates elect, the yeas and nays being entered on the journal. The convention may appoint such officers, employees and assistants as it may deem necessary, fix their compensation, provide for the printing of its documents, journals, proceedings and a record of its debates, and appropriate money for the expenditures incurred. The sessions of the convention shall be held with open doors, and it shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its delegates. In case of a vacancy by death, resignation or other cause, the vacancy shall be filled by the governor by the appointment of another delegate of the political party of the delegate causing the vacancy." (Section 3(b))

"Any proposed Constitution or constitutional amendment adopted by the convention shall be submitted to a vote of the electors of the state at such time, in such manner and containing such separate and alternative propositions and on such official ballot as may be provided by the convention, at a special election not less than sixty days nor more than six months after the adjournment of the convention. Upon the approval of the Constitution or constitutional

Honorable J. Anthony Dill

amendments the same shall take effect at the end of thirty days after the election. The result of the election shall be proclaimed by the Governor." (Section 3(c))

By reference to the three above cited sections, it can be seen that they do not admit of a procedure by which a constitutional convention may be limited in the scope of its consideration of the Constitution. Cases before the Missouri Supreme Court involving the power of constitutional conventions indicate that a properly convened constitutional convention has plenary control over its proceedings. In State ex rel. News Corporation v. Smith (Mo.Sup. en banc 1945) 184 S.W.2d 598, an original proceeding in mandamus was brought to compel the State Auditor to approve a voucher and issue a warrant for the payment for the printing of the newsletter of the constitutional convention; in that opinion the court stated:

" . . . There is nothing in the Constitution requiring the Convention to proceed in any particular manner, that is, by bill or ordinance, nor is there any requirement that its plan for submission of its work must be merged into one ordinance or resolution. . . ." [loc. cit. 600]

Clearly, Article XII, Section 3(a), (b) and (c) provides no procedure by which a constitutional convention may be limited to the consideration of a specific amendment or several specific amendments for consideration. The Supreme Court of Missouri, in an analogous area considering the proper procedure for amending the Constitution by initiative, stated in Moore v. Brown (Mo.Sup. en banc 1942) 165 S.W.2d 657:

" . . . It is fundamental that the people, themselves, are bound by their own Constitution, 1 Cooley on Constitutional Limitations, 8 Ed., p. 81. Where they have provided therein a method for amending it, they must conform to that procedure. Any other course would be revolutionary, the cases have said. . . ." [loc. cit. 659; emphasis the Court's]

Article XII, Section 3(a), (b) and (c) provide no method by which a constitutional convention may be limited in its consideration of proposed amendments, and therefore we conclude that there is no legal method by which a Missouri constitutional convention may be limited in its consideration to specific proposed amendments.


Honorable J. Anthony Dill

CONCLUSION

It is therefore the opinion of this office that Article XII, Section 3(a), (b) and (c) of the Missouri Constitution provides no method by which a constitutional convention may be limited in its consideration of proposed amendments.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

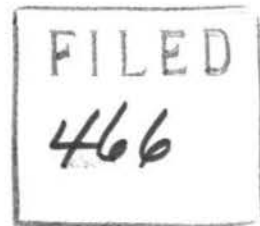
TAXATION (INTANGIBLE):
LABOR UNIONS:

Intangible personal property in which labor unions have a legal, equitable, or beneficial interest is subject to the intangible personal property tax.

OPINION NO. 466

December 20, 1971

Honorable Thomas A. Walsh
State Representative
Room 314, State Capitol
Jefferson City, Missouri 65101



Dear Representative Walsh:

In your recent opinion request you refer to an opinion of this office dated October 7, 1946 (No. 64) to the Honorable M. E. Morris, then Director of Revenue, holding that intangible personal property owned by charitable, religious and educational institutions is subject to the Missouri intangible personal property tax. Your specific question is whether the conclusion of this opinion encompasses intangible personal property tax held by labor unions?

That opinion, a copy of which is attached, extensively and ably discussed the constitutional basis for exemption from taxation. In addition, numerous judicial decisions are cited that are germane to the underlying question of the power to grant exemption from taxation.

An examination of the statutes dealing with intangible personal property tax (Chapter 146, RSMo 1969) clearly indicates that the legislature fully intended to subject intangible personal property held by labor unions to taxation. Section 146.030, RSMo 1969, indicates who is liable for intangible personal property tax. That section states:

"The tax for the year 1947 and each succeeding year shall be apportioned among those persons who during the preceding calendar year held or acquired the legal title to or equitable title or beneficial interest in intangible

Honorable Thomas A. Walsh

personal property subject to the property tax provided by section 146.020, according to the part of the entire yield of such property which they respectively received during the preceding calendar year, and each such person shall be liable for his resultant portion of said tax."

In determining the applicability of this section, one must refer back to the definitions section, section 146.010, to determine whether a labor union falls within the statutory classification of a "person." Section 146.010(2) defines person as follows:

"The term 'person' includes any individual, firm, copartnership, joint adventure, association, corporation, company, estate, trust, business trust, syndicate, executor, administrator, receiver or trustee appointed by the state or federal court, or any other group or combination acting as a unit."
(Emphasis added)

It is clear that a labor union falls within the scope of the definition of the term "person". Traditionally labor unions have been considered associations. E.g., International Association of Machinists v. Gonzales, 356 U.S.617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1957); Local No. 218, Bakery and Confectionery Workers International Union of America v. Local American Bakery and Confectionery Workers International Union, AFL-CIO, 405 S.W.2d 917 (Mo. 1966); Forest City Mfg. Co. v. International Ladies' Garment Workers' Union, Local No. 104, 111 S.W.2d 934 (Mo.App.1938); Graham v. Grand Division Order of Railway Conductors, 107 S.W.2d 121 (Mo.App.1937).

The comprehensive definition of "person" in section 146.010 clearly indicates that the legislature attempted to encompass any extant or potential form of organization. Even if one could maintain that a labor union is not technically an association, it still would be subject to the intangible personal property tax as clearly it is "any other group or combination acting as a unit."

CONCLUSION

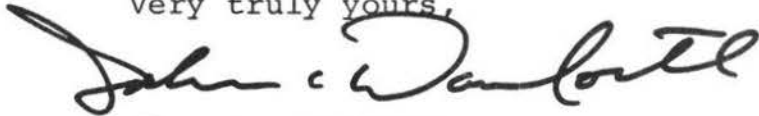
It is the conclusion of this office that intangible personal property in which labor unions have a legal, equitable, or beneficial interest is subject to the intangible

Honorable Thomas A. Walsh

personal property tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

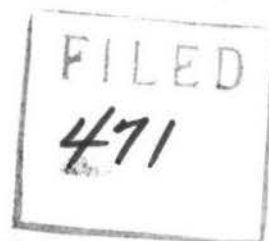
JOHN C. DANFORTH
Attorney General

enclosure: Op. No. 64
10-7-46, Morris

December 6, 1971

OPINION LETTER NO. 471
Answer by letter-Nowotny

Honorable J. F. Patterson
State Senator, District 25
112 West 18th
Caruthersville, Missouri 63830



Dear Senator Patterson:

This is in reply to your request for an opinion of this office in which you ask whether the Engrossing Clerk of the Senate may receive bills that have been filed as of December 1, 1971, as provided by House Bill No. 156, 76th General Assembly, since the office of the Secretary of the Senate is vacant.

House Bill No. 156 provides for the filing of bills in a certain period prior to the annual session and Section 2 provides as follows:

"A member or a member-elect of the senate may file a bill by mail or in person, according to appropriate rules of the senate, with the secretary of the senate at any time during the filing period. Upon receiving a bill filed during the filing period preceding a regular session of the general assembly in an odd-numbered year, the secretary of the senate shall immediately have the bill printed and made available according to the rules and practices of the general assembly next preceding that for which the bill is filed and those bills received during the filing period preceding a regular session in an even-numbered year shall be printed and made available according to the then effective rules of that general assembly."

Honorable J. F. Patterson

Section 4 then provides that bills filed during such period are automatically introduced on the opening day of the following session.

Both the Secretary of the Senate and the Engrossing Clerk are appointed by the Senate pursuant to Article III, Section 18, Constitution of Missouri, which also empowers the Senate to determine the rules of its own proceedings. You have advised us that the Senate has not promulgated any special rules relating to House Bill No. 156. However, the present rules of the Senate may be applicable.

Rule No. 3 provides that the fifth order of business shall be the introduction of bills.

Rule No. 18 specifies duties of the Secretary as follows:

"It is the duty of the secretary to keep an exact journal of the proceedings of the senate and he shall, from time to time, be subject to further orders, as the senate may direct. It shall be sufficient in recording action on bills by the senate for the Journal to refer to them by number only, except when the bills are presented for the first time, or when final action is taken on third reading, in which case the title shall be set out in full."

In addition to these rules, you have advised us that the practice of the Senate is that when bills are introduced when the Senate is in session the bills are actually given to the Engrossing Clerk who receives the bills for introduction and records the bills in the Senate Journal. You have further advised that such functions of the Engrossing Clerk were done under the supervision of the Secretary.

It is our opinion from these rules and practices of the Senate that in actual practice the Engrossing Clerk has been given the duties of assistant to the Secretary. See Section 21.150 referring to an assistant secretary. Since it was the Senate and not the Secretary who made such determination then such person can continue to act even though the office of Secretary is vacant. See Attorney General's Opinion No. 235, December 12, 1968, Holman.

Therefore, any bills filed as of December 1, 1971, with the Engrossing Clerk, acting with the consent of the Senate as assistant

Honorable J. F. Patterson

secretary to the Senate, would be valid and effective as they concern the public. See 67 C.J.S., Officers, Section 154; and 43 Am. Jur., Public Officers, Section 469.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 235
12-12-68, Holman

MERIT SYSTEM:
STATE EMPLOYEES:
CITIES, TOWNS AND VILLAGES:

A state merit system employee is not prohibited from accepting an appointive position with a city and holding both positions.

OPINION NO. 475

December 22, 1971



Honorable A. Basey Vanlandingham
Missouri Senate, 19th District
Post Office Box 117
Columbia, Missouri 65201

Dear Senator Vanlandingham:

This is in response to your request for our legal opinion on whether or not a state merit system employee is prohibited by Section 36.150 from taking an appointive nonpaying position with a city. Specifically you have asked:

"Does Section 36.150, RSMo, prohibit an employee, under the merit system, to take an appointive non-paying position of a city?"

It is the opinion of this office that a state merit system employee is not prohibited by Section 36.150 from accepting an appointive position with a city. The applicable language is as follows:

"No employee selected under the provisions of this law shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club. He shall take no part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen to express his opinion and to cast his vote. No such employee shall be a candidate for nomination or election to any public office except he resign, or obtain a regularly granted leave of absence, from such position." Section 36.150(5), RSMo 1969 (Emphasis added)

This language does prohibit a merit system employee from becoming a candidate for nomination or election to a public office unless

Honorable A. Basey Vanlandingham

he resigns or is granted a leave of absence. However, this language does not prohibit a merit system employee from accepting an appointive position with a city, although this position may be a public office. As long as the public office with a city is obtained by appointment and not by election, Section 36.150 does not prohibit the merit system employee from lawfully holding both positions.

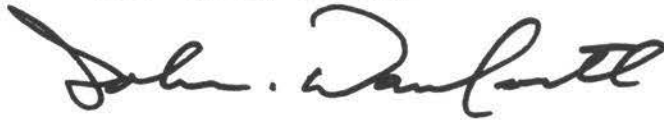
Attorney General's opinion, No. 45, dated May 1, 1953 to J. Rex James, holding that a state employee who is employed in a classified position under the merit system cannot be a candidate for election for the office of director of city schools, dealt exclusively with elective public offices. Nothing in this opinion should be construed to prohibit a state merit system employee from accepting an appointive position with a city.

CONCLUSION

It is the opinion of this office that a state merit system employee is not prohibited from accepting an appointive position with a city and holding both positions.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard S. Paden.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH
Attorney General

December 17, 1971

OPINION LETTER NO. 476
Answer by letter-Wieler

Honorable Walter E. Allen
Prosecuting Attorney
Linn County Courthouse
Brookfield, Missouri 64628



Dear Mr. Allen:

This is in response to your request for an opinion as to the date at which points are assessed on the driving record of an individual when said individual is convicted of a traffic offense in a magistrate court but subsequently appeals to the circuit court.

Specifically, you have asked whether the points would be assessed as of the date of the original conviction in magistrate court, or as of the date the appeal to the circuit court is dismissed or results in conviction.

Section 302.302, RSMo 1969, provides that the Director of Revenue shall put into effect a point system for the suspension and revocation of chauffeur's and operator's licenses. Subsection 1 of that section provides that ". . . Points shall be assessed only after a conviction or forfeiture of collateral. . . ."

Section 302.010(4), RSMo 1969, provides the following definition of the term "conviction":

"'Conviction', any final conviction; also a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction, except that when any conviction as a result of which points are assessed under section 302.302 is appealed, the term 'conviction' means the original judgment

Honorable Walter E. Allen

of conviction for the purpose of determining the assessment of points, and the date of final judgment affirming the conviction shall be the date determining the beginning of any license suspension or revocation under section 302.304;"

Thus, the statutes clearly provide that points assessed on an individual driving record are to be applied as of the date of his original conviction in magistrate court.

Yours very truly,

JOHN C. DANFORTH
Attorney General

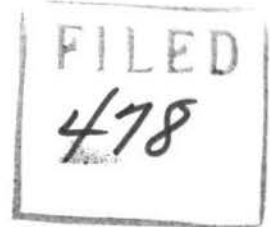
BONDS:
SCHOOLS:

When the voters of a reorganized school district have approved building bonds, such bonds may be issued after subsequent approval by the voters of a reorganization plan which will result in the creation of a new district if the bonds are presented for registration before the board of directors of the new district organizes pursuant to Section 162.301, RSMo 1969.

OPINION NO. 478

December 15, 1971

Honorable Christopher S. Bond
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bond:

This is in response to your request for an opinion on the following question:

"Does the board of education of a school district continue to have authority to issue building bonds of such district subsequent to an election at which voters approved a plan of reorganization of the school district and prior to the holding of an election to select a new board of education?"

"Shall the State auditor register such bonds?"

We understand the voters of a reorganized school district (herein referred to as the "old reorganized district") approved a bond issue September 21, 1971. On November 30, 1971, the voters of an area comprising all of the old reorganized district and a common school district approved a plan of reorganization pursuant to Section 162.191, RSMo 1969; said plan having been submitted to them by the county board of education pursuant to Section 162.181, RSMo 1969. The old reorganized district and the common district will constitute a new reorganized district. Directors for the new district will be elected at an election to be held December 20, 1971. As of the date of this opinion, the bonds of the old reorganized district have been approved by that district but have not yet been issued, pending registration by the State Auditor.

A review of the case law of this state reveals no decision directly in point to your first question of the opinion request. The statutory provisions for the commencement of existence of a new district and the dissolution of the old districts which become a part of a new district are not entirely clear. However, we are

Honorable Christopher S. Bond

of the opinion that the new district commences existence at the time its first board of directors organizes, which must be within four days after the directors are elected. See Section 162.301, RSMo 1969.

We believe that House Bill No. 468 of the 76th General Assembly, truly agreed to and finally passed and signed by the Governor, governs the election of the first board of directors for the new district. That bill provides:

"Section 1. Section 162.241, RSMo, 1969, is repealed and one new section enacted in lieu thereof, to be known as section 162.241, to read as follows:

"Section 162.241. If a proposal to form a six-director district under provisions of section 162.223 receives a majority of the votes cast on the proposition at the organization election, the state board of education or the county board of education, in the case of a district formed under provisions of sections 162.171 through 162.191, shall order an election in the district to be held not more than thirty days after the date of the election when formation of the district was approved. This election shall be for the purpose of electing six members to serve on the school board of the district. The election shall be conducted in the manner provided by sections 162.361 and 162.371 at the polling places selected by such persons or body in the county or counties charged with conducting such elections. A letter from the commissioner of education, delivered by certified mail, to the president of the county board of education of the county to which the district formed by provisions of section 162.223 is assigned shall be the authority for the county board to proceed with election procedures in the same manner as they would be performed by the district board of education were it in existence; but the costs of the election shall be paid from the incidental fund of the new district. Two directors shall be elected to serve until the next annual election, two to serve until the second annual election, and two to serve until the third annual election."

While it might appear from the first clause of the first sentence of that bill that it has reference only to consolidation of school

Honorable Christopher S. Bond

districts under Section 162.223, RSMo 1969, a procedure of no moment to this opinion, we believe the reference to Sections 162.171 through 162.191 in the first sentence of that bill indicates the bill has application to reorganization of school districts, the procedure we are concerned with in this opinion. Sections 162.171 through 162.191 are concerned with school district reorganization; and if House Bill No. 468 were read to only apply to consolidation under Section 162.223, the reference to Sections 162.171 through 162.191 would be meaningless.

Therefore, under House Bill No. 468, the directors of the newly reorganized school district are chosen thirty days after the election approving the plan of reorganization. That is the procedure that is being followed in the new district which will include the old reorganized school district which is the subject of this opinion.

We are of the opinion that prior to the election and qualification of the board of directors of the new district, the old district continues in existence with full power to perform all acts permitted by law, including the issuance of building bonds. If the board of directors of the old districts did not have such power, there would be a gap between the time a plan for reorganization was adopted and the organization of the first board of directors of the newly reorganized district. During such gap the schools in the area involved would have no governing body, a result we believe the legislature never intended. Having found that the old reorganized district continues in existence until the directors of the newly reorganized district assume office, we find no authority that would limit their power to issue bonds.


Therefore, you may proceed to register the bonds of the old reorganized school district if presented before the board of directors of the new district comprising the old district organizes pursuant to Section 162.301; provided you find the bonds to otherwise be in proper form.

CONCLUSION

It is the opinion of this office that when the voters of a reorganized school district have approved building bonds, such bonds may be issued after subsequent approval by the voters of a reorganization plan which will result in the creation of a new district if the bonds are presented for registration before the board of directors of the new district organizes pursuant to Section 162.301, RSMo 1969.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

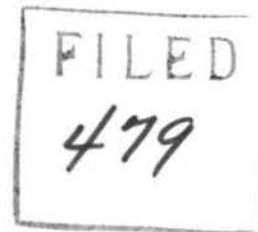
Yours very truly,


JOHN C. DANFORTH
Attorney General

December 10, 1971

OPINION LETTER NO. 479
Answered by Klaffenbach

Honorable W. Clifton Banta, Jr.
Prosecuting Attorney
Mississippi County
105 North First Street
Charleston, Missouri 63834



Dear Mr. Banta:

This letter is in answer to your request for an opinion of this office concerning whether the county clerk of a third class county is required to prepare the county financial statement required by Section 50.800, RSMo 1969.

Section 50.800 states in part:

"11. At the end of the statement the person designated by the county court to prepare the financial statement herein required shall append the following certificate: . . .

"Officer designated by county court to prepare financial statement required by section 50.800, RSMo.

"Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following form:

"Clerk of the county court and ex officio officer designated to prepare financial statement required by section 50.800, RSMo." (Emphasis added)

The language employed above leads us to conclude that if no one else is designated to prepare the financial statement the county clerk has the duty to prepare the statement.

Honorable W. Clifton Banta, Jr.

In order to avoid any misunderstanding between the county court and the clerk as to his function in this respect it would be appropriate for the court to enter an order that the county clerk prepare such statement in his official capacity if no other person is designated.

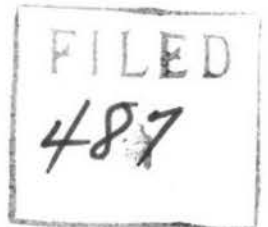
Very truly yours,

JOHN C. DANFORTH
Attorney General

December 17, 1971

OPINION LETTER NO. 487
Answer by Letter - Sikes

Mr. William Y. McCaskill, Superintendent
Division of Insurance
Jefferson State Office Building
Jefferson City, Missouri 65101



Re: Declaration of Intention and Articles of
Incorporation of Farm Bureau Casualty Company

Dear Mr. McCaskill:

Pursuant to your request of November 18, 1971, an examination has been made of an executed copy of Declaration of Intention and Articles of Incorporation of Farm Bureau Casualty Company for the purposes of examination as provided for in Section 379.040, RSMo 1969.

It is the opinion of this office that the Declaration of Intention and Articles of Incorporation of Farm Bureau Casualty Company are in conformity with the provisions of Sections 379.010 through 379.160, RSMo 1969, and not inconsistent with the Constitution and Laws of this State and the United States.

The foregoing opinion which I hereby approve, was prepared by my assistant, Alfred C. Sikes.

Yours very truly,

JOHN C. DANFORTH
Attorney General

December 23, 1971

OPINION LETTER NO. 489
Answer by Letter - Klaffenbach

Honorable Charles S. Stratton
Prosecuting Attorney
Henry County Courthouse
Clinton, Missouri 64735



Dear Mr. Stratton:

This letter is in answer to your opinion request in which you ask:

"May a County Court pay a tax bill for paving of the inside one-half (1/2) of the Public Square in Clinton, Henry County, Missouri from the special road and bridge tax fund? The Square is around the Court House and payment for the paving was requested under Section 88.510 R.S. Missouri 1969. The Public Square is not a county road running through the incorporated town of Clinton."

Section 88.510 RSMo 1969 authorizes tax bills by third class cities against counties for certain improvements abutting lands owned by such counties. Section 137.585 RSMo 1969 to which you refer relates to counties having a township form of government and we presume you intended to refer to Section 137.555 RSMo 1969 which applies to such road and bridge funds in Henry County. The latter section provides that such funds shall be used for "road and bridge purposes and for no other purpose whatever," except as specifically otherwise therein provided.

It is our view that road and bridge funds cannot be used to pay such a tax bill pursuant to Section 88.510. However that section expressly authorizes the payment of such tax bills out of general revenue funds.

Honorable Charles S. Stratton

It is also our view as expressed conversely in the enclosed opinion No. 423 dated October 19, 1970 to Sprague that a transfer of funds from the general fund to the road and bridge fund in the amount of such tax bill would be proper where, as in this instance, payment of the tax bill has been erroneously made from the road and bridge fund.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

Op. No. 423; 10/19/70; Sprague